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The regulatory framework for trade in IGAD livestock products

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Publication date:
2007

Document Version
Publisher's PDF, also known as Version of record

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):
Desta, M. G. (2007). *The regulatory framework for trade in IGAD livestock products*. (IGAD LPI Working Papers; No. 07-08). Intergovernmental Authority on Development. http://www.igad-lpi.org/publication/docs/IGADLPI_WP07_08.pdf

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**IGAD
Livestock
Policy
Initiative**

The Regulatory Framework for Trade in IGAD Livestock Products

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Working Paper written for the IGAD Livestock Policy Initiative
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**A Living from
Livestock**

■ **IGAD LPI Working Paper No. 07 - 08**

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ACKNOWLEDGEMENTS

In conducting the research for this paper, I have travelled to the region quite a few times and held meetings, discussions, interviews and informal chats with several people working in, for or somehow connected with the livestock sector - government officials, farmers, lawyers, livestock exporters, FAO and IGAD officials, veterinary officers, researchers, consultants, NGO officials, and diplomats. Virtually all were helpful and generous with their time and their ideas. I have benefited hugely from their expertise and am grateful to all of them.

Tim Robinson always found time to respond to my endless requests, whether about contacting potential information sources on my behalf or writing to embassies and FAO country offices asking them to help me in my work or commenting on several earlier drafts of the paper. David Leonard, Christopher Stevens, Brian Perry, Jeroen Dijkman, Abdi Jama, Otieno Mtula, and Samuel Zziwa have given me invaluable comments on the draft. My thanks also go to Victor Mosoti who from the start of the project helped me open my eyes to some of the key issues in the sector, and to Suffyan Koroma who tried his best to make me understand some basic statistical data relevant for my work. While I gratefully acknowledge my debt to all these and other people who helped me during this work, all responsibility for any views or errors in this paper is solely mine.

Disclaimer

This is a working paper written for the IGAD Livestock Policy Initiative (IGAD LPI), but the views contained herein are the sole responsibility of the author and can in no way be attributed to the FAO or IGAD or any of their member states

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Date of publication: November 2007.

LIST OF ACRONYMS

ACP	African, Caribbean and Pacific Group of States
AEC	African Economic Community
AoA	STOAgreement on Agriculture
AOAD	Arab Organization for Agricultural Development
ARSC	Animal Resources Service Company (Sudan)
AU-IBAR	Africa Union/Inter-African Bureau for Animal Resources
BSE	Bovine Spongiform Encephalopathy
CAP	Common Agricultural Policy (EU)
CBPP	Contagious Bovine pleuropneumonia
CEN-SAD	Community of Sahel-Saharan States
Codex	Codex Alimentarius Commission
COMESA	Common Market for Eastern and Southern Africa
CPA	Comprehensive Peace Agreement (Sudan)
DG SANCO	EU's Health and Consumer Protection Directorate-General
EAC	East African Community
EBA	Everything but Arms
EC	European Communities
EEC	European Economic Communities
EPA(s)	Economic Partnership Agreement(s)
EU	European Union
FAO	United Nations Food and Agriculture Organization
FMD	Foot and Mouth Disease
GATT	General Agreement on Tariffs and Trade
HS	Harmonized System (the Harmonized Commodity Description and Coding System)
IGAD LPI	IGAD-FAO Livestock Policy Initiative
IGAD	Inter-Governmental for Authority and Development
INC	Interim National Constitution (Sudan)

IOR-ARC	Indian Ocean Rim-Association for Regional Cooperation
IPPC	International Plant Protection Convention
ITC	International Trade Centre
KLMC	Kenya Livestock Marketing Council
KMC	Kenya Meat Commission
LDC	least developed country
LMA	Livestock Marketing Authority (Ethiopia)
LMMC	Livestock and Meat Marketing Corporation (Sudan)
LPI	Livestock Policy Initiative
MFN	Most-Favoured Nation
MOTI	Ministry of Trade and Industry (Ethiopia)
NEPAD	New Partnership for Africa's Development
OECD	Organization for Economic Cooperation and Development
OIE	World Organization for Animal Health
PAFTA	Pan-Arab Free Trade Agreement
PPLPI	Pro-Poor Livestock Policy Initiative
RQF	Regional Quarantine Facility (Djibouti)
RVF	Rift Valley Fever
SCM	WTO Agreement on Subsidies and Countervailing Measures
SPLM/A	Sudan People's Liberation Movement/Army
SPS	WTO Agreement on Sanitary and Phytosanitary Measures
TPRM	Trade Policy Review Mechanism (WTO)
USDA	United States Department of Agriculture
VCJD	Variant Creutzfeldt-Jakob Disease
WAHID	World Animal Health Information Database
WHO	World Health Organization
WTO	World Trade Organization

The IGAD region has one of the largest concentrations of livestock in the whole world. However, this resource wealth has not been translated into export revenues for the countries and the people who depend for their livelihood on the sector. Indeed, livestock producers are often among the poorest sections of society suffering extreme poverty and lack of food security.

Several factors may be responsible for this mismatch between actual resources and export revenues from those resources, including prevalence of animal diseases, producers' lack of market orientation, and poor veterinary and administrative infrastructure. This study assesses the extent to which the regulatory framework governing livestock production and trade at all levels, i.e. national, regional as well as international, may have contributed to this gap. The underlying assumption is that participation in international trade tends to create more favourable conditions for poverty alleviation.

The regulatory framework: The regulatory framework within which IGAD livestock products are traded has an 'internal' dimension that is made up of the laws and institutions of each IGAD member state and the regional arrangements in which they actively participate, and an 'external' or 'global' dimension made up of laws and institutions that exist almost independently of the IGAD region. The fact that virtually all IGAD member states are actual or potential exporters of livestock products means that the 'internal' aspect of the regulatory framework has to be shaped around the needs of the 'external', thereby creating or requiring a continuous process by which the former has to adapt itself to the latter.

The 'external' aspect of the regulatory framework: This is made up of international and regional treaty regimes, 'national' laws and institutions in export markets, and increasingly standards set by the private sector. The major players include such multilateral institutions as the WTO, which sets and administers the rules of global trade, and the OIE and Codex which set global standards for production and trade in the livestock sector. The 'national' laws and regulations of states members of these organizations normally incorporate these rules and standards. However, while big players such as the European Union sometimes manage to effectively transform their own rules into international standards through international standard-setting institutions, the influence of the poorest countries has remained weak for a variety of reasons.

The 'internal' aspect of the regulatory framework: This is made up of the laws, institutions and practices of the IGAD member states themselves acting alone or as part of a regional initiative. However, IGAD does not yet have a common policy and legal framework for trade in livestock products and its members are free to pursue their own policies individually or in cooperation with others. The result is a rather fragmented regulatory approach to what are fairly similar, if not identical, policy challenges. Not only are IGAD member states not developing an IGAD-wide framework, different countries are pursuing a multiplicity of different and sometimes overlapping bilateral and regional initiatives at closer economic integration in which IGAD as a unit plays no role. This can have serious implications for the future of IGAD and its livestock industry. The sooner IGAD member states decide what they want to do within IGAD in terms of economic policy coordination and integration, the better.

At the national level, while there are significant differences among the national legal systems of the IGAD member states, particularly those of Ethiopia, Kenya and Sudan, there are signs of convergence in their livestock regimes, which reflects the commonality of challenges they face and the often identical requirements they have to meet in order to participate in the international market. Their internal regulatory challenges are also increasingly similar, including incomplete, out-dated and

incoherent sanitary and food safety regulations, multiple and excessive taxation of livestock destined for export, legal uncertainties, weak and inefficient judiciary, disregard for the rule of law in day-to-day administrative decision making, lack of effective coordination among different levels of government in the enforcement of laws, absence of established communication channels between stakeholders in the livestock industry and relevant government institutions, and overall lack of capacity to use law as an instrument to implement policy decisions. Most of these problems are mere manifestations of the general underdevelopment of the countries' legal systems and they can only be overcome gradually and as part of long-term overall development. But, a host of measures can be taken in the short term to address some of these.

What can be done? IGAD member states can do a great deal at IGAD level as well as unilaterally and bilaterally.

- Externally, there is no doubt that the IGAD livestock industry is faced with an unfriendly international regulatory environment in the design of which its member states have virtually no say. But, their interests also suffer from possibly illegal measures taken by governments of actual or potential export markets for IGAD livestock products. IGAD member states could consider several options, including:
 - (1) Accession to relevant international organizations: those IGAD member states that are not members of these organizations should actively seek accession and IGAD member states already within those organizations could use their powers to support the accession of their fellow IGAD member states, and
 - (2) Collective representation in relevant international organizations: while this might look rather unrealistic in the current political environment within IGAD, their collective interest would be best served if they speak with one voice at these organizations, ideally through a single representative with an IGAD-wide mandate.
- At the national level, the single most important first step is to conduct a law review and possibly law reform process with a view to developing a coherent, up-to-date, complete, accessible and enforceable set of sanitary and food safety regulations for the livestock industry. Kenya, the country with relatively the most advanced legal system in the region, is already doing that while the countries that need it most are not.
- Likewise, the law review and reform process suggested above can also be used to address the problems of multiple and excessive taxation of the livestock sector and any other laws and practices that discourage business and investment in the sector. While taxing exports is an easy and tempting way of collecting government revenue, we need to realize that export taxes are a thing of the past and the real competition among livestock exporting countries has largely been on the amount of overt and covert subsidies they can provide to their livestock exporters. IGAD members may not need, nor afford, to provide export subsidies, but they can at least abstain from actively discouraging businesspeople who may want to operate in the field.
- At a more general level, IGAD member states must look at rule of law as part and parcel of the effort to encourage economic activity and achieve economic development and poverty reduction. This requires, among other things, cultivating an administrative culture in which every decision is based on clearly articulated legal authority, and ultimately subject to review by an independent and competent administrative or judicial organ. These are complex developmental issues that can only evolve over an extended period of time, but we must start somewhere. Two actions that can be taken immediately in this respect are:
 - (1) compilation of all relevant laws and making them available to stakeholders within these countries (preferably in hard copy) as well as

publishing them on a dedicated web site to make them available more widely,
and

(2) provision of basic legal training to relevant government officials and private sector people working in the livestock sector.

Conclusion: It is worth emphasising that in this science-intensive field, regulatory issues are only a small part of the problem. Analysis of EU sanitary and food law and the generous preferential scheme put in place by the EU for the benefit of IGAD livestock exporters shows that even the markets of well-meaning partners that are prepared to go out of their way to encourage imports from the IGAD region still remain totally closed due to the non-negotiable subject of sanitary standards. The conclusion that follows from here is fairly straightforward: until IGAD member states somehow manage to satisfy international sanitary requirements, the rhetoric about the use of trade as a tool of development will remain illusory and the resource-intensive negotiations at the WTO to get developed countries to reduce traditional market access barriers and subsidies to agricultural products may be difficult to justify in economic terms.

INTRODUCTION: THE REGULATORY FRAMEWORK FOR TRADE IN IGAD LIVESTOCK PRODUCTS

This paper aims to look into the regulatory framework within which trade in IGAD livestock products operates.¹ The study tries to assess whether this framework encourages or discourages trade in livestock products within IGAD as well as with third countries. The ultimate objective of the study is to identify key regulatory problems, national, regional and global, affecting trade in the sector and to provide policy recommendations for improvement.

This is a study in regional and international trade law and policy. A combination of methods has been used to collect relevant information, including identification of relevant national laws and policies; international treaties, standards, guidelines and recommendations; meetings with relevant government officials and non-governmental stakeholders in the livestock sector; and a review of existing literature on the subject. Quantitative data used in this paper, although usually taken from official sources, are not always consistent. The whole purpose of their use is to give a broad idea of how significant the livestock sector is in the economy of the IGAD member states.

Scope of the Study

The products covered in this paper are those classified as animals and animal products in Section I of the Harmonised System (HS) nomenclature except fish and fish products. This includes Chapter 1 of the HS on live animals, Chapter 2 on meat and edible meat offal, Chapters 4 and 5 on dairy and other edible products of animal origin, and Chapter 41, HS Headings 41.01 to 41.03 on raw hides and skins.² However, the IGAD reality also shows that, apart from raw hides and skins for which the standards burden is lighter, most cross-border trade in the sector is concentrated in live bovine animals (HS Heading 01.02), live sheep and goats (HS Heading 01.04) and meat, i.e. HS Headings 02.01 and 02.02 on fresh, chilled and frozen bovine meat and 02.04 on meat of goats and sheep. As such, while most of the discussion should equally apply to all livestock products, the illustrations in this paper will be based mainly on the latter two segments of the livestock industry.

Structure

The paper is structured as follows: firstly, an introductory chapter will provide some quantitative information about the IGAD livestock industry in general and livestock trade in particular. Based on available data from the International Trade Centre (ITC), the World Trade Organization (WTO) and national sources, this chapter aims to provide the factual context that informs the subsequent legal analysis. To that end, this chapter provides information about the significance of the sector in the economy of IGAD member states, its share in their export mix, and its potential for export revenue generation, employment and overall economic development in those countries.

¹ Unless the context indicates otherwise, the term “livestock products” is here used to refer to both live animals and animal products.

² This choice is based on the WTO definition of agricultural products which excludes fish and fish products from its coverage. For an official text of the Harmonised system nomenclature, see World Customs Organization, http://www.wcoomd.org/ie/En/Topics_Issues/topics_issues.html.

The second chapter then goes into the heart of the paper, which is about the regulatory framework within which cross-border trade in general takes place, but with a particular emphasis on those aspects of the regulatory framework that have special relevance for the IGAD livestock industry. This regulatory framework is made up of international and regional treaty regimes and national laws and institutions. The focus here will be on the multilateral trading system of the WTO that sets and administers the rules of global trade and the OIE and Codex, two technical institutions of decisive importance that set global standards for production and trade in livestock products and whose role in this capacity is recognized by the WTO itself. IGAD and its member countries are subject to this regulatory framework but they are also players in its making and continued evolution; they have the right to influence its content and pace of development just as they are bound by its system of rules. Chapter 2 will thus assess the extent to which IGAD and IGAD member states participate in the establishment and administration of these rules and standards at the global level. Chapter 2 aims to provide a comprehensive understanding of how trade in livestock products is regulated by this network of trade and standards institutions.

Chapter 3 then goes into the regional and national dimensions of this regulatory framework at the IGAD and member state level. This part is vital to the paper but it is also rather complicated. First of all, there is nothing like an IGAD-wide common policy and legal framework for trade in livestock products and all that can be said here is limited to whatever there is in the form of general statements of aspiration and non-binding declarations of intent about the desirability of setting up common policies in all sorts of areas including closer economic integration. Secondly, different IGAD member states are pursuing a multiplicity of different and sometimes overlapping regional initiatives at closer economic integration in which IGAD as a unit plays no role. This means that Chapter 3 is largely about the national dimension of the regulatory framework. Accordingly, this chapter looks at selected regulatory issues that affect the livestock industry in the region focussing on three IGAD member states - Ethiopia, Kenya and Sudan.

Chapter 4 attempts to assess the impact of sanitary barriers on the export opportunities of IGAD member states with particular reference to the EU livestock import regime. The EU has had long-standing preferences for IGAD products and the purpose of this chapter is to demonstrate how even the markets of well-meaning countries and regions that are prepared to go out of their way to encourage imports from the IGAD region still remain totally closed due to the non-negotiable subject of sanitary standards.

Chapter 5 summarizes the findings of the study and concludes with a list of policy recommendations.

CHAPTER 1. THE IGAD LIVESTOCK INDUSTRY: BACKGROUND

This chapter aims to provide background information about the IGAD livestock sector, its importance to the economies of the member countries, and the volume and direction of trade in livestock products within the region and with third countries.

1.1. The IGAD Livestock Sector

The IGAD region is particularly well-endowed with livestock resources and a significant number of people in the region directly depend on the sector for their livelihood.

Ethiopia is believed to have the largest livestock population not just in the IGAD region but in the whole of Africa. According to a 2004 census from the Ethiopian Central Statistical Authority, Ethiopia had about 44.32 million cattle, 23.62 million sheep, 23.33 million goats, 2.31 million camels and over 42 million poultry (excluding agro-pastoral and pastoral areas).³ According to FAO data, Ethiopia's livestock sector accounts for about 18.8% of GDP and livestock supports and sustains the livelihoods of an estimated 80% of the rural poor.⁴

Data from the Arab Organization for Agricultural Development (AOAD) show that Sudan has nearly as many livestock resources as Ethiopia.⁵ According to AOAD data for 2004, Sudan had an estimated population of 39.7million cattle, 48.9 million sheep, 42.1 million goats, 3.7 million camels, 0.88 million horses, and 6.6 million mules and asses.⁶ According to Sudan Government sources, the livestock sector currently accounts for about 20% of the national GDP.⁷

But, it is in Somalia that the livestock sector occupies the most pre-eminent position. FAO estimates put Somalia's total livestock population at about 37.5 million for 1998 and at 38.9 million for 1999.⁸ According to the World Bank, in 1990, the Somalia livestock sector "provided employment and livelihoods for about 55% of the population and accounted for 80% of the export earnings in a normal year."⁹

The Government of Kenya estimates that, in 2004, Kenya had about 29 million chickens, 10 million beef cattle, 3 million dairy and dairy crosses, 9 million goats, 7 million sheep, 0.8 million camels, 0.52 million donkeys and 0.3 million pigs.¹⁰ It is worth noting that although the statistics put Kenya far behind Ethiopia and Sudan in terms of sheer numbers, Kenya has the highest per capita consumption of milk in

³ See FAO Technical Cooperation Department, "NEPAD – Comprehensive Africa Agriculture Development Programme – Ethiopia: 'Live Animal and Meat Export' – Preliminary Options Outline", TCP/ETH/2908 (I), (NEPAD Ref. 05/08 E), January 2005, p. 2.

⁴ See FAO-AGAL, *Livestock Sector Brief: Ethiopia* (2004) pp. 1 and 3

⁵ See FAO-AGAL, *Livestock Sector Brief: Sudan* (2005) p. 2 noting that Sudan has the second largest livestock wealth in Africa next only to Ethiopia.

⁶ See Arab agricultural statistics database, at <http://www.aoad.org/aas2/index.htm>.

⁷ Discussion with Dr Hassan Mohamed Nur, Head, Department of Planning and Livestock Economics, Ministry of Animal Resources and Fisheries, 26 February 2007, Khartoum.

⁸ See World Bank, *Somalia From Resilience Towards Recovery and Development: A Country Economic Memorandum for Somalia* (Report No. 34356-SO, January 2006) para. 5.13, p. 77.

⁹ See *Id.* para. 5.11, p. 77.

¹⁰ See Kenya Ministry of Agriculture and Ministry of Livestock and Fisheries Development, *Strategy for revitalizing Agriculture 2004-2014* (March 2004), p. 7.

Africa.¹¹ The livestock sub-sector contributes 10% of Kenya's GDP and 30% of the national agriculture GDP.¹²

In Uganda, the livestock sector represents only about 7.5% of GDP and 17% of agricultural GDP. According to a 2004 NEPAD-FAO estimate, the livestock population stood at about 5.8 million cattle, 1 million sheep, 6.2 million goats, 1.5 million pigs and about 24 million units of poultry.¹³ The other two countries, Eritrea and Djibouti, have much smaller livestock wealth. Eritrea's livestock population was estimated in 2003 at about 1.9 million cattle, 2.1 million sheep, 1.7 million goats, 1.3 million birds, and 0.1 million camels.¹⁴ According to the FAO, Djibouti had an estimated 0.29 million cattle and nearly one million sheep and goats in 2002.¹⁵

1.2. IGAD Livestock Exports

Information on IGAD livestock exports is both scarce and unreliable. Indeed, according to Peter Little, "almost all regional trade (>95 percent) in livestock in eastern Africa is carried out via unofficial channels."¹⁶ This means that it is virtually impossible to know the exact amount of intra-IGAD trade in particular. Most of the information in this section will thus be about IGAD exports to non-IGAD member states, particularly the Middle East, and even then the statistics reproduced here should be taken as nothing more than broad indicators.¹⁷

In terms of the absolute size of livestock exports, Sudan is the most successful country in the IGAD region. According to data from the Sudan Animal Resources Service Company, Sudan earned slightly over US\$ 181 million from the export of livestock products in 2004.¹⁸ ITC data for 2005 show that Sudan earned a total of over US\$ 145 million from the export of live animals, meat and raw hides and skins and leather, and products of animal origin.¹⁹ Sudan's success in the export of live animals particularly to Saudi Arabia is nearly half a century old and has, according to Aklilu, led to the establishment of long-standing business relationships for generations.²⁰

¹¹ See Kenya Ministry of Livestock and Fisheries Development, *Draft Dairy Policy 2006 – Towards a Competitive and Sustainable Dairy Industry for Economic Growth in the 21st Century and Beyond* (Nairobi, March 2006), p. 5. See also Henning Steinfeld and Pius Chilonda, "Old players, new players", *Livestock Report 2006* (FAO Rome 2006), p. 11. See also H. Muriuki et al, *The policy environment in the Kenya dairy sub-sector: A review* (SDP Research and Development Report No. 2, Nairobi 2003).

¹² See "Speech by the Minister for Livestock and Fisheries Development Hon. Joseph Konzollo Munyao ... during the Official Re-Opening of Kenya Meat Commission" on 26th June 2006, available at <http://www.livestock.go.ke>.

¹³ See FAO-NEPAD, *Comprehensive Africa Agriculture Development Programme: Uganda Livestock Development Project* (TCP/UGA/2910 (I) (NEPAD Ref. 04/03 E) Volume III of VI), November 2004, p. 1. See also FAO-AGAL, *Livestock Sector Brief: Uganda* (2005) p. 2.

¹⁴ See FAO-NEPAD, *Comprehensive Africa Agriculture Development Programme: Support to NEPAD-CAADP Implementation*, TCP/ERI/3006 (I) (NEPAD Ref. 05/10 E), Volume I of V, National Medium Term Investment Programme (NMTIP), *January 2005*, p. 6. See also FAO-AGAL, *Livestock Sector Brief: Eritrea* (2005) p. 2.

¹⁵ FAO-AGAL, *Livestock Sector Brief: Djibouti* (2005) p. 2.

¹⁶ See Peter Little, presentation at FAO conference March 1-2, p. 3, available at http://www.fao.org/es/ESC/common/ecg/110973_en_LITTLE_Paper_Cross_Border_Trade_and_Food_security_FAO_Feb_2007.pdf. Note that Little defines eastern Africa to include Sudan, northern Kenya, Somalia, Ethiopia, Eritrea, and Djibouti, virtually the entire region on which this study focuses.

¹⁷ Note also that the figures used in this section are only export data and do not take into account imports of the same products.

¹⁸ See ARSC, *Statistics for Livestock Markets in Sudan* (10th ed., Khartoum 2004) p. 3.

¹⁹ See: http://www.intracen.org/appli1/TradeCom/TP_TP_CI.aspx?RP=706&YR=2005, hereafter ITC (2005).

²⁰ See Yacob Aklilu, *An Audit of the Livestock Marketing Status in Kenya, Ethiopia and Sudan* (Nairobi, April 2002, Vol. I), p. 63.

Like Sudan, Ethiopia's main export market for its livestock products is the Middle East, largely limited to Saudi Arabia,²¹ the United Arab Emirates, and Yemen. However, Ethiopia's livestock exports are more modest. ITC data for 2005 show that Ethiopia earned a total of nearly US\$ 90 million from the export of raw hides, skins and leather, meat, live animals and products of animal origin.²² The OECD 2007 African Economic Outlook noted that Ethiopia earned US\$ 18.5 million from meat and meat product exports in 2005/06, which was up from US\$ 14.6 million in 2004/05.²³ This reality of today contrasts with the promising developments witnessed in the sector in the early 1970s when Ethiopia exported livestock products such as corned beef and canned beef to European and Asian countries including Italy, Belgium and Japan.²⁴ The same period also witnessed peak live animal exports mainly to the Middle East.²⁵ This promising development was nipped in the bud as a result of the 1974 military takeover in the country and it was only in the past few years that Ethiopia's livestock exports started showing signs of recovery.²⁶

The change of fortunes for the Kenyan livestock export industry was even more dramatic. Until the 1980s, Kenya not only exported a significant amount of livestock products to the Middle East and Europe, its status as a livestock exporting country was put on a firm legal footing when it became the only IGAD member state to secure quota-guaranteed access to the EU market under the beef/veal protocol to the Lomé agreements between the EC and the ACP countries.²⁷ However, Kenya currently exports only small amounts of livestock products.²⁸ Indeed, the most significant livestock export recently was that of live animals to Mauritius which, according to Kenya Export Promotion Council data for 2005, amounted to a mere US\$ 866,525.²⁹ Kenya's livestock exports today are so low that President Kibaki was happy to cite Kenya's exportation of about 11,800 head of cattle and 9,000 goats, worth about 290 million Shillings, over an eighteen-month period between 2005 and 2006, as a sign of

²¹ There are five companies in Ethiopia today that have their own abattoirs approved by the Ethiopian veterinary administration for export purposes; they export mainly sheep meat and goat meat to Saudi Arabia. These five companies have import licenses issued to them by the Saudi Ministry of Agriculture, which did so after physical inspection of their slaughterhouse and other facilities on the ground. Besides, the Saudi Embassy in Addis Ababa is also involved in the form of authentication of export documents issued by relevant Ethiopian authorities. Interview with H. E. Essam Baitalmal, Ambassador of Saudi Arabia to Ethiopia, held on 29 August 2008.

²² See: ITC (2005).

²³ OECD, *African Economic Outlook 2007* (Paris 2007), p. 259.

²⁴ See Yacob Aklilu, "A Review of Policies and their Impact on Livestock Trade in Ethiopia during Three Regimes (1965-2005)", in John McPeak and Peter Little (eds.) *Pastoral Livestock Marketing in Eastern Africa: Research and Policy Challenges* (Intermediate Technology Development Group Publishing, 2006), pp. 187-202.

²⁵ Sheep exports however continued to rise even after the mid-1970s. See *Id.* p. 192.

²⁶ Aklilu noted that with the entry of the private sector into the market, there has been a steady growth in chilled meat (mutton, goat meat and beef) exports, "from 2,508 MT in 1998 to over 5,000 MT in 2004". Aklilu (2006), *supra* n. 24, p. 199.

²⁷ For more on this, see *infra*, Chapter IV, on EC import regime for IGAD livestock products.

²⁸ It has been reported recently that Kenya exports dairy products to Europe, the Middle East, and Africa but this must be quite small. See WTO, *Trade Policy Review Report by the Secretariat: East African Community: Revision*, (WT/TPR/S/171/Rev.1 31 January 2007, hereafter WTO (2007)), p. A1-53.

²⁹ See http://www.epckkenya.org/cbik/sum_reports.asp. ITC trade data for 2005 however shows that Kenya exported live animals worth US\$ 4.03 million (see ITC (2005), indicating either data accuracy problems or that Kenya is exporting small numbers of live animals to a large number of countries. Farmers Choice, a Kenyan meat-processing company, also claims that it exports "an average of 2000 Metric tons of Farmer's Choice processed products annually to about 15 countries across Africa, the GCC ... and the Indian Subcontinent."²⁹ ITC data for 2005 show that Kenya earned a total of about US\$ 55 million from the export of raw hides, skins and leather, meat, live animals and products of animal origin. See ITC (2005).

resurgence of interest in the sector.³⁰ According to Kenya's Minister of Livestock, Joseph Munyao, the livestock sub-sector "accounts for more than 10% of export earnings and employs over 50% of the agricultural labour force."³¹ This positive assessment does not however seem to be shared by experts who studied the Kenyan livestock sector,³² and indeed the Kenyan Ministry of Livestock itself has recently acknowledged that Kenya is "currently self-sufficient in most of the animal products except in beef and mutton."³³

Somalia is another IGAD member state with a significant export interest in the livestock sector. A World Bank study showed that, as of 2004, the value of sheep and goats exports from the ports of Berbera and Bosasso "is estimated at more than US\$ 60 million and of all livestock exports at US\$ 79 million."³⁴ According to ITC data for 2005, Somalia's exports of live animals, raw hides, skins and leather, and products of animal origin amounted to just under US\$ 70 million. Indeed, live animal exports alone accounted for about 55% of Somalia's total export for that year.³⁵

The figures for the other three IGAD member states are much smaller. ITC data for 2005 show that Djibouti earned a total of just under US\$ 10 million from the export of raw hides, skins and leather, live animals and products of animal origin, Eritrea just over US\$ 2 million and Uganda about US\$ 13 million.³⁶

1.3. Summary

As noted earlier, although the data reproduced in this section are more of estimates than actual census figures, a few general observations can be deduced from them. Firstly, the IGAD region has one of the largest concentrations of livestock in the whole world. Secondly, this large resource wealth has not been translated into export revenues for the countries and the people who depend for their livelihood on the sector. Even for the relatively more successful Sudan, its livestock exports are minuscule compared to the resource potential of the country. And thirdly, although several factors may be responsible for this mismatch between actual resources and export revenues from those resources, the next section will assess the issue from one particular angle - the extent to which the regulatory framework governing livestock production and trade at all levels - i.e. national, regional as well as international - has contributed to this gap.

³⁰ See speech by President Mwai Kibaki on the occasion of his re-opening of the Kenya Meat Commission on 26 June 2006, as reported by the Kenya Broadcasting Corporation, available at <http://www.statehousekenya.go.ke>.

³¹ See Munyao speech, *supra* n. 12.

³² According to Aklilu, Kenya today is only "broadly self-sufficient" in livestock products, that Kenya imports about 50 MT of canned beef annually and small amounts of boneless meat and sausages and "in the case of the total beef consumed about 22% is from cattle trekked into Kenya through the porous borders with the neighbouring countries of Somalia, Sudan, Ethiopia and Tanzania." Aklilu (2002, Vol. I), *supra* n. 20, p. 2.

³³ See Kenyan Ministry of Livestock and Fisheries Development, *Draft Sessional Paper on National Livestock Policy* (Nairobi, 2007), p. 3.

³⁴ See World Bank, *supra* n. 8, para. 2.29, p. 18.

³⁵ See ITC (2005).

³⁶ See ITC (2005).

CHAPTER 2. THE REGULATORY FRAMEWORK FOR TRADE IN LIVESTOCK PRODUCTS: THE GLOBAL DIMENSION

2.1 Introduction

A country's or region's ability to take part in and benefit from trade in a particular product depends on its ability to produce goods and services of commercial quality and quantity but also on the rules governing its transactions. This is particularly so for products in the highly sensitive and tightly regulated food sector. Every time there is a food-borne or animal disease outbreak, of which there have been plenty recently,³⁷ the temptation is almost always to blame it on unsafe foreign food or animals and, more often than not, the first measure will take the form of a ban or other restriction on imports,³⁸ sometimes followed by similar measures internally. This might of course be understandable if we remember society's alarm at, for example, the suggestion from Italian mothers in 1980 that infant food containing beef from hormone-treated animals "caused their babies to grow breasts and menstruate" or the revelation that the agent that causes the neurodegenerative Bovine Spongiform Encephalopathy (BSE) in cattle also causes its human equivalent, variant Creutzfeldt-Jakob disease (vCJD).

It is thus no wonder that the food sector is regulated by high profile national, regional and international bodies such as the US Food and Drug Administration and the Department of Agriculture, the EU's Health and Consumer Protection Directorate-General (often called DG SANCO) and particularly its Food and Veterinary Office (FVO), the FAO/WHO Codex Alimentarius Commission and the International Office of Epizootics (OIE). While the primary mission of such institutions is to protect the consumer against unsafe food or animal imports,³⁹ a number of other regional and global institutions, for example IGAD itself, the EAC, the Common Market for Eastern and Southern Africa (COMESA) and the WTO, attempt to ensure that such legitimate interests do not unnecessarily restrict international trade.

The relationship between these two groups of institutions and regimes is always a tense one. Nobody openly and seriously advocates the complete cessation of trade in food and animal products in order to eliminate every imaginable risk of disease transmission or food contamination; nor does any one openly advocate the complete abolition of regulatory and sanitary controls so as to establish complete free trade in such products. But, there is always a state of tension between free trade on the one

³⁷ To mention but a few: the FMD outbreak in Brazil and Argentina in 2005-06; the alarming spread of Avian Influenza and outbreaks in 56 African, Asian and European countries since its first detection in 2003; the discovery in 2003 of BSE-infected cows in North America (see Laura Loppacher and William Kerr, "The Efficacy of World Trade Organization Rules on Sanitary Barriers: Bovine Spongiform Encephalopathy in North America", 39(3) *Journal of World Trade* (2005), pp. 427-743); and the RVF outbreak in Kenya in 2006. These have all led to trade restrictions of different magnitudes and durations. Cluff notes that "the notification of trade bans for meat has never been higher". Merritt Cluff, *Impact of Animal Disease Outbreaks on Livestock Markets: An FAO Analysis*, paper presented at an FAO Symposium on "Market and Trade Dimensions of Avian Influenza Prevention and Control", Rome 14 November 2006, available at http://www.fao.org/es/ESC/en/20953/21014/21574/event_109566en.html.

³⁸ For data and analysis, see N. Morgan and A. Prakash, "International livestock markets and the impact of animal disease", in 25(2) *OIE Scientific and Technical Review* (OIE, 2006) pp. 517-528.

³⁹ To that end, many of these institutions have enormous powers to achieve their goals. Alexei Barrionuevo put it very well when he observed that the US Department of Agriculture, which has powers in the field of animal and meat imports, can require a foreign country "to duplicate American slaughterhouse practices and send inspectors to certify foreign plants." See "Food Imports often Escape Scrutiny", *New York Times*, May 1, 2007. Almost exactly the same can be said about the EU's DG SANCO and comparable authorities in other developed countries.

hand and protection of health and safety on the other, and the regulatory framework that governs regional and international livestock trade at any time reflects the balance struck between them for that particular moment. This balance shifts over time in response to movements in science and technology, the ever-shifting power of interest groups behind every policy option, popular risk perception and tolerance level, and the resulting political will of states. International law here serves a vital purpose. By providing a set of rules governing the relationship, international law provides a bulwark against instability and unpredictability as it lasts, and by providing a consultative and negotiating forum for states, it furnishes a framework for the orderly introduction of change without unnecessary disruption.

This chapter aims to provide an overview of the global aspect of this intricate regulatory framework. It will focus on the WTO, the OIE and Codex, individually as well as in their interaction, and will assess the extent to which IGAD and its member states participate in the establishment and administration of the rules and standards of these institutions and the degree to which they are able to conform to the requirements under the system.

2.2 WTO Rules Governing Livestock Trade: an Overview

The WTO sets the rules of global trade, follows up their implementation, serves as a forum for further trade negotiations, and provides a rules-based, effective and efficient dispute settlement mechanism for its members. Its scope of operation is wide and expanding. Its predecessor, the General Agreement on Tariffs and Trade (GATT), started life as an interim arrangement with a set of rules applying to trade in goods only, and even then its application to agricultural trade was largely limited, in a few but important cases by explicit derogations from GATT's major principles and, in others, through contracting parties' wilful neglect of their clear obligations in the agricultural sector.

One of the most significant achievements of the GATT Uruguay Round (1986-1994) was the conclusion of a specific Agreement on Agriculture (AoA),⁴⁰ whose long-term objective is to establish "a fair and market-oriented agricultural trading system" while its short-term mission was to launch the reform process and take the first steps towards that long-term goal. The AoA disciplines on, inter alia, the three pillars of agricultural market access, domestic support and export subsidies constituted that first step on the path of reform. Thanks to the Uruguay Round, the level of standard trade restriction that applies today in the livestock sector is not as high as it used to be. To take the bound tariff levels for fresh or chilled beef carcasses and half-carcasses from a selection of WTO members as an example, the EC schedule sets it at 12.8% ad valorem plus € 176.8 per 100 kg⁴¹; Japan's is set at 50% ad valorem⁴²; Korea's at 40%

⁴⁰ For a comprehensive study of the treatment of agricultural products by the GATT-WTO system, see Melaku Geboye Desta, *The Law of International Trade in Agricultural Products: from GATT 1947 to the WTO Agreement on Agriculture* (Kluwer, 2002); Bernard O'Connor (ed.) *Agriculture in WTO Law* (Cameron May, London, 2005); and Joseph McMahon, *The WTO Agreement on Agriculture: A Commentary* (Oxford 2007).

⁴¹ This is a reduction from a base period (1986-88) level of 20.0% *ad valorem* plus a specific duty of 2,763 ECU/T. See EC schedule to the WTO (Schedule LXXX) for HS Code 0201.10.50, carcasses and half-carcasses. All national schedules of WTO member countries are available on the WTO web site, at http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm. Incidentally, note that EC applied tariff for this product is the same as its bound tariff at the WTO. See Part Two of Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (*OJ L* 256, 7.9.1987, p. 1), Regulation last amended by Council Regulation (EEC) No 2658/87 of 23 July 1987, and is based on the harmonised system. (*OJ L* 301, 31.10.2006), hereafter EC Customs Schedules 2007.

⁴² This is a reduction from 93% for the 1986-88 base period. See Japan's schedule to the WTO (Schedule XXXVIII) for fresh or chilled beef carcasses and half-carcasses (0201.10).

ad valorem⁴³; Egypt's at 10% ad valorem⁴⁴ and Saudi Arabia's at 7% ad valorem.⁴⁵ Similar commitments in the area of domestic support and export subsidies have also added further discipline into the system. The three IGAD member states that are members of the WTO - Djibouti, Kenya and Uganda - made use of flexibilities under the 1993 Modalities Agreement, which allowed them to offer only ceiling bindings.⁴⁶ Accordingly, Djibouti bound its tariffs for most agricultural products at 40%, which is in addition to a 100% tax that applies at the border⁴⁷; Kenya has a ceiling binding of 100% for all agricultural products⁴⁸ and Uganda put its ceilings at 80%, again for all agricultural products.⁴⁹ The national tariffs of Kenya and Uganda (and also of non-IGAD Tanzania) have however been replaced by the common external tariff of the EAC since 1 January 2005, which led to "a marked reduction" in the applied tariffs of Kenya,⁵⁰ "an overall decrease" of average tariffs on imports into Tanzania,⁵¹ and "an overall increase" of average duties on imports into Uganda.⁵² It is noteworthy that several countries maintain applied tariffs lower than their bound tariffs - Saudi Arabia is a good example here as it applies tariff levels between 0% and 5% for several agricultural products including livestock.⁵³

However, WTO members still maintain a host of trade-restrictive and -distortive measures in agriculture that are permissible under the AoA, including trade-distortive domestic support and export subsidies. Indeed, this is recognized by the AoA itself. Article 20 of the AoA was designed to build an agenda for future negotiations so that these AoA disciplines would be only the first step in a reform process that should lead to the eventual establishment of a fair and market-oriented agricultural trading system. The current agriculture negotiations at the WTO are part of the endeavour to bring this objective one step closer to reality. While many developed countries are working hard in these negotiations to save their agricultural subsidy schemes, which are injurious to developing country farmers, "over-taxation" was identified by none other than the WTO Secretariat itself as "one of the main constraints for Kenya's agriculture", the richest of the IGAD member states.⁵⁴ The so-called world market is thus a place where this over-taxed farmer in some of the poorest countries competes against farmers who are paid by the public just to stay on the farm.

Most importantly, the modest-looking tariff levels indicated above and the damaging subsidy schemes do not provide a full picture of the level of trade restrictions applying in the livestock sector, and the AoA does not cover everything for trade in the agricultural sector. On the key subject of what are termed sanitary and phytosanitary (SPS) measures, for example, the AoA only cross-refers to the SPS Agreement and

⁴³ This is a reduction from 44.5% for the 1986-88 base period. See Korea's schedule to the WTO (Schedule LX) for fresh or chilled beef carcasses and half-carcasses (0202.10.0000).

⁴⁴ See Egypt's schedule to the WTO (Schedule LXIII).

⁴⁵ See Saudi Arabia schedule to the WTO (Schedule CLVIII).

⁴⁶ See Uruguay Round *Modalities for the Establishment of Specific Binding Commitments under the Reform Programme* (MTN.GNG/MA/W/24) 20 Dec. 1993. Paragraph 14 of the Modalities Agreement provides: "In the case of products subject to unbound ordinary customs duties developing countries shall have the flexibility to offer ceiling bindings on these products."

⁴⁷ See Djibouti schedule to the WTO (Schedule CXXXVII).

⁴⁸ See Kenya schedule to the WTO (Schedule CXIII).

⁴⁹ See Uganda schedule to the WTO (Schedule CXXVI).

⁵⁰ See WTO (2007), *supra* n. 28, p. A1-53.

⁵¹ See *Id.*, p. A2-152.

⁵² See *Id.*, p. A3-233.

⁵³ See USDA Foreign Agricultural Service, *Saudi Arabia: Trade Policy Monitoring Saudi Arabian Applied Tariff Rates for Agricultural Products 2006* (GAIN Report Number SA6006, May 2006), p. 3.

⁵⁴ See WTO (2007), *supra* n. 28, p. A1-76.

records the fact that WTO members have agreed to give effect to that agreement.⁵⁵ A combination of genuine health and safety considerations and the misuse of such concerns for protectionist motives means that IGAD livestock products are often banned from entry into many of these markets regardless of what the official tariff levels may be.⁵⁶ An understanding of the SPS Agreement is thus crucial for a fuller appreciation of the regulatory framework that governs global trade in livestock products. It is notable however that agricultural products are subject to the full-range of WTO agreements, including the GATT 1994, the SCM Agreement and the TBT Agreement, to mention only a few. The focus in this section on the SPS Agreement is only because animal disease and food safety concerns are presently the principal challenges facing the IGAD livestock industry.

2.2.1 SPS Measures under the GATT-WTO System

Although trade liberalization is the principal mission of the GATT-WTO system, it recognizes that trade is not an end in itself, but only a means to an end - the end being welfare maximization. In the pursuit of its trade liberalization mission, the trading system has always been sensitive towards overriding public policy objectives such as food safety and the environment. The general exceptions of GATT Article XX that provide justification for violation of such sacred GATT principles as non-discrimination and ban of quantitative restrictions have been part of the GATT architecture from the beginning. The GATT Article XX(b) exceptions for the protection of human, animal and plant life or health are of particular relevance to the livestock sector.

The challenge here is fairly easy to understand but rather tricky to resolve: how can we encourage trade in all products and enhance opportunities for economic gain without at the same time putting at risk human, animal or plant life or health? Realizing these twin goals is the most daunting challenge of the multilateral trading system and has always been a crucial North-South battleground - the developed countries trying to ensure that their trade policy commitments would not compromise their right and duty to protect their citizens against the importation of unsafe foods or other health hazards in the name of free trade, and the developing countries trying to ensure that developed country health and sanitary standards would not come as protectionist wolves dressed in health and safety sheepskin. The traditional reluctance of developed countries to open their agricultural markets to competition⁵⁷ only exacerbates the latter fear. This is what the old GATT Article XX(b) and the new WTO SPS Agreement attempt to resolve. Both have been the subject of some of the most contentious dispute settlement cases over the years, and the livestock sector has been at the centre of many of them.⁵⁸

⁵⁵ See Article 14 of the AoA. This totally unnecessary, and indeed meaningless, provision appears to be a result of the negotiating history of the *SPS Agreement*, which started as part of the agriculture negotiations but was later taken out as a subject of its own.

⁵⁶ This will be demonstrated further in Chapter 4 with the help of EU law and practice in this area.

⁵⁷ The structure of GATT-WTO law shows very clearly that its pro-market rules and principles are strongest in sectors where developed countries are likely to win the competition on the market, and the weakest in sectors where these countries are likely to lose. As Jagdish Bhagwati noted, “[t]he willingness to play by the rules of free trade has always been easier ... for countries that expect to win from Darwinian competition.” See Bhagwati, “The Demands to Reduce Domestic Diversity among Trading Nations”, in Jagdish Bhagwati and Robert Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (MIT Press, 1997), Vol. I, p.21. For the way this system is structured for agricultural products, see Desta, *supra* n. 40.

⁵⁸ See the famous *EC Measures Concerning Meat and Meat Products* (WT/DS26, WT/DS48 1997, hereafter *EC Hormones*). This case is particularly relevant for this study as the issues addressed therein relate to the EC’s use of sanitary requirements to ban the importation of US and Canadian beef treated with specific types of growth promoting hormones. Other GATT/WTO disputes involving the livestock sub-sector, although not directly related to health and safety, include *European Economic Community -*

2.2.1.1 GATT Article XX(b) and Livestock Trade

The approach used to achieve a balance between trade liberalization and protection of health and safety has evolved over time. Under GATT 1947, countries were free to adopt measures “necessary to protect human, animal or plant life or health” or measures “relating to the conservation of exhaustible natural resources” provided that such measures did not serve as means of arbitrary or unjustifiable discrimination between countries or as disguised restriction on international trade.⁵⁹ This meant, in the case of GATT Article XX(b), that as long as countries were able to demonstrate why a certain measure was ‘necessary’ to achieve the specified health objectives, and the implementation of such measures was free of the discrimination and disguised trade restriction conditions, they could develop their measures with almost unlimited discretion.⁶⁰

Countries often invoke this exception to justify measures that would otherwise be illegal under GATT/WTO, and several trade disputes have revolved around the interpretation of Article XX(b). In these disputes, panels as well as the Appellate Body (AB) have recognized Article XX(b) as an exception from the rule which “clearly allowed contracting parties to give priority to human health over trade liberalization”⁶¹, with the procedural implication that this is a kind of affirmative defence for which the burden of proof rests with the defendant and that the provision has to be interpreted restrictively.⁶² This means that GATT Article XX must be invoked as a defence by a responding party before a tribunal may consider it and even then only if it has found violation of another provision. GATT/WTO jurisprudence has already established that a responding party that invokes GATT Article XX(b) as an affirmative defence must show: “(1) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health; (2) that the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective; and (3) that the measures were applied in conformity with the requirements of the introductory clause of Article XX.”⁶³

In practice, most countries that tried to justify SPS measures on the basis of GATT Article XX(b) often failed on the necessity requirement, which is understood to mean

Imports Of Beef from Canada Recourse to Article XXIII:2 by Canada: Report of the Panel adopted on 10 March 1981 (L/5099 - 28S/92); *Republic of Korea - Restrictions on Imports of Beef* – (Complaint by Australia/New Zealand/United States), panel reports adopted on 7 November 1989 (L/6504 - 36S/202; L/6505 - 36S/234 and L/6503 - 36S/268); *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (WT/DS161, WT/DS169, 2000); *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (WT/DS98, 1999), *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (WT/DS103, WT/DS113 in 1999 but dragged on until 2002). See also *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291/R, WT/DS292/R, WT/DS293/R, 2006).

⁵⁹ See GATT Article XX(b) and (g) respectively.

⁶⁰ As Sykes says, under the GATT, regulators were “free to adopt whatever regulations they wished, even if the regulations raised the costs of foreign suppliers disproportionately and thus had the effect of insulating domestic firms from foreign competition.” Alan Sykes, “Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: a Pessimistic View”, 3 *Chicago Journal of International Law* (Fall, 2002) p. 355.

⁶¹ See *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes* report of the panel (DS10/R BISD 37S/200) adopted November 1990, para. 73.

⁶² In the words of the WTO Appellate Body, Article XX contains “limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves” and that “it is only reasonable that the burden of establishing such a defence should rest on the party asserting it”. *US – Wool Shirts and Blouses* (WT/DS33) AB Report, p. 14.

⁶³ See *United States - Standards for Reformulated and Conventional Gasoline* (WT/D02, 1996) AB Report, p. 38.

the least-trade-restrictive measure available to a country to achieve its policy goals.⁶⁴ The only case in which a GATT/WTO member successfully defended a measure on the basis of GATT Article XX(b) was EC Asbestos where a French ban on the manufacture, importation, exportation, and domestic sale and transfer of certain asbestos products on health grounds was found to be “necessary to protect human ... life or health” within the meaning of Article XX(b) of the GATT 1994.⁶⁵

GATT Article XX(b) was thus not easy to invoke as a justification for an otherwise illegal trade-restrictive measure. This does not however mean that GATT contracting parties abstained from the use of SPS measures for protectionist ends; it only means that they often did so in complete disregard of their GATT obligations. The frustration caused by this practice of using SPS measures for protectionist ends was reflected in the Punta del Este Declaration that launched the Uruguay Round in 1986, whose aim in this case was to minimize “the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture”.⁶⁶ The protectionist aspect of SPS measures was so ingrained that many feared the promised agricultural liberalization of the Uruguay Round would be thwarted by countries resorting instead to SPS measures “as an alternative form of protection.”⁶⁷ Developing countries tried to minimize this risk by pushing for “the widest possible use of international standards,”⁶⁸ while many others, including the EC, argued for the right of countries to apply SPS standards more stringent than those agreed internationally, inter alia, because “countries which had achieved high health standards would find it difficult to accept moving to lower standards.”⁶⁹ The result of this negotiation process is the SPS Agreement.

Before turning to a brief analysis of the SPS Agreement, it is worthwhile to point out that the disagreement between the US and the EC over hormone-treated beef formed part of the negotiation background of this Agreement. The EC introduced a ban on the use of certain hormones domestically as far back as 1981,⁷⁰ and imposed an import ban on hormone-treated beef effective 1 January 1989, right in the heat of the Uruguay Round negotiations.⁷¹ The hormone dispute was thus seen both as an

⁶⁴ The established approach to the interpretation of the term ‘necessary’ in GATT Article XX, first articulated by the panel in *US – Section 337* in respect of GATT Article XX(d), has been that “a contracting party cannot justify a measure inconsistent with another GATT provision as ‘necessary’ in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.” *United States – Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345, para. 5.26. The WTO AB has expressly affirmed this standard in *Korea – Beef*, See AB Report (WT/DS161 and WT/DS169), para. 166.

⁶⁵ See WTO, *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products: Report of the Panel* (WT/DS135, 2001), AB Report para. 175.

⁶⁶ See GATT, *Ministerial Declaration on the Uruguay Round* (MIN.DEC) adopted in Punta del Este, Uruguay, on 20 September 1986, reproduced in GATT, *Focus Newsletter*, No. 41 (October 1986).

⁶⁷ See John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (Geneva 1995) p. 236.

⁶⁸ See *Id.* p. 237.

⁶⁹ See *Id.* p. 237.

⁷⁰ See Council Directive 81/602/EEC of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action, *OJ L* 222, 7.8.1981, pp. 32-33.

⁷¹ See Adrian Halpern, “Comment: The U.S. - E.C. Hormone Beef Controversy and the Standards Code: Implications for the Application of Health Regulations to Agricultural Trade”, 14 *North Carolina Journal of International Law and Commercial Regulation* (1989).

indication of the need for GATT reform and an obstacle to that reform.⁷² In the words of one observer, the hormones disagreement “motivated much of the text” of the SPS Agreement.⁷³ It was also the hormones dispute that later gave the WTO dispute settlement system and the Appellate Body in particular one of the first opportunities to clarify the meaning of key principles of the SPS Agreement. The livestock issues thus played a very direct role in shaping the text of the SPS Agreement and emerging jurisprudence afterwards.

2.2.1.2 The WTO SPS Agreement

The SPS Agreement that was concluded as part of the Uruguay Round elaborates the provisions of GATT Article XX(b), but also goes beyond that in some senses.⁷⁴ Like GATT Article XX(b), the SPS Agreement also reaffirms that “no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health”. This is however subject to a series of conditions that are designed to ensure that such rights are not misused for protectionist purposes.⁷⁵ Just like GATT Article XX, the SPS Agreement is also fundamentally about striking a balance between the sovereign right of states to adopt and enforce all measures necessary for the protection of human, animal or plant life or health on the one hand, and the desire to promote international trade on non-discriminatory terms, on the other.⁷⁶ Indeed, the SPS Agreement aims “to improve the human health, animal health

⁷² Michael B. Froman, “Recent Developments Note: The United States-European Community Hormone Treated Beef Conflict”, 30 *Harvard International Law Journal* (1989), p. 555.

⁷³ See David Wirth, “The Role of Science in the Uruguay Round and NAFTA Trade Disciplines”, 27 *Cornell International Law Journal* 817 (Summer 1994), p. 824.

⁷⁴ The *SPS Agreement* provides for detailed rules governing the use of SPS measures by WTO members. Annex A to the *SPS Agreement* defines a sanitary or phytosanitary measure to mean “any measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.” SPS measures thus include “all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.”

⁷⁵ The first paragraph of the Preamble of the *SPS Agreement* provides, for example, that such measures must not be applied “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade.” Article 2 goes further and requires that such measures be “not inconsistent with the provisions of this Agreement.” *SPS Agreement* provisions relevant to this include Article 2.2. which requires that SPS measures be “based on scientific principles” and are “not maintained without sufficient scientific evidence”; Article 2.3 which requires that such measures “not be applied in a manner which would constitute a disguised restriction on international trade”, and Article 5 which requires that such measures are based on risk assessment (“taking into account risk assessment techniques developed by the relevant international organizations”).

⁷⁶ The point at which the *SPS Agreement* strikes this balance and its interpretation by WTO panels and the Appellate Body has caused divisions among WTO law experts. Sykes agrees with the AB on its strict construction of particularly the scientific evidence requirement of the *SPS Agreement* as an only way to prevent such conditions being reduced to mere “window dressing” (see Sykes 2002, *supra* n. 60, p. 368). Guzman, on the other hand, argues that the WTO’s approach is “inappropriately intrusive” and that all reviews of national measures by panels and the AB must be limited to transparency and procedural requirements of the *SPS Agreement*. Andrew Guzman, “Food Fears: Health and Safety at the WTO”, 45(1) *Virginia Journal of International Law* (2004), pp. 1-39. See also J. Wagner, “The WTO’s

and phytosanitary situation in all Members”,⁷⁷ an objective that is often forgotten in the commercially-centred debate that often characterizes this subject. Finally, the SPS Agreement also aims to establish “a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade”.⁷⁸

The WTO’s approach to the twin objectives of respecting, and even supporting, member countries’ rights to protect human, animal and plant health and safety on the one hand, and minimizing the adverse trade effects of such safety measures on the other, is effectively to trust science and leave countries free to do whatever they like provided they can find scientific justification for it.⁷⁹ In practice, this has meant two things: (1) to encourage the harmonization of SPS measures around international standards⁸⁰ and (2) to recognize the right of countries to set their standards at whatever level they deem appropriate, even higher than the level of corresponding international standards, provided, inter alia, that they are based on scientific principles and have scientific justification.

In pursuing its objective of encouraging the harmonization of SPS standards, the SPS Agreement identified a non-exhaustive list of three international organizations – the Codex Alimentarius Commission (Codex) for food standards,⁸¹ the OIE for animal health⁸² and the institutions under the auspices of the International Plant Protection Convention⁸³ for plant health – often called the “three sisters”. The standards set by the OIE and Codex are particularly relevant to the livestock industry and this chapter aims to provide an overview of how these institutions affect trade in this sector and the effectiveness of IGAD and its member states’ representation in these institutions.

Interpretation of the *SPS Agreement* has Undermined the Right of Governments to Establish Appropriate Levels of Protection Against Risk”, 31 *Law & Policy International Business* (2000), pp. 855-860; and Bruce Silverglade, “The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?”, 55 *Food and Drug Law Journal* (2000), pp. 517-524. Victor thinks the very concern is misplaced, arguing instead that “the latitude afforded to nations in setting their own food safety standards is so large that nearly all bona fide attempts to protect food safety will be consistent with the *SPS Agreement*.” See David Victor, “The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment after Five Years”, 32 *New York University Journal of International Law and Politics* (2000), pp. 865-937, at 872.

⁷⁷ See *SPS Agreement* preamble, para. 2.

⁷⁸ See *SPS Agreement* preamble, para. 4 (emphasis added).

⁷⁹ Note that the use of science as the arbiter in cases involving product standards was first introduced into the multilateral trading system by the Tokyo Round standards code. See in particular Article 14 of the Tokyo Round Agreement on Technical Barriers to Trade (Geneva: GATT, 12 April 1979) calling on technical expert groups to examine the ‘detailed scientific judgements involved’ in a dispute. For more on this, see Doaa Abdel Motaal, “The ‘Multilateral Scientific Consensus’ and the World Trade Organization”, 38(5) *Journal of World Trade* (2004), pp. 855-876.

⁸⁰ Annex A (para. 2) to the *SPS Agreement* defines harmonization to mean: “The establishment, recognition and application of common sanitary and phytosanitary measures by different Members.” For a discussion of harmonization as understood in the field of international trade law more broadly, see David Leeborn, “Lying Down with Procrustes: An Analysis of Harmonization Claims”, in Bhagwati and Hudec (1997), Vol. I, *supra* n. 56, pp. 41-117.

⁸¹ Codex food safety standards, guidelines and recommendations recognized by the *SPS Agreement* are those relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice. See Annex A:3(a) of the *SPS Agreement*.

⁸² OIE sets standards, guidelines and recommendations for animal health and zoonoses. See Annex A:3(b) of the *SPS Agreement*.

⁸³ The IPPC system sets standards, guidelines and recommendations for plant health. See Annex A:3(c) of the *SPS Agreement*.

2.2.2 The SPS Agreement, Harmonization of Standards and Livestock Trade

The harmonization of food standards has unquestionable trade-enhancing potential. A World Bank study in 2001 attempted to quantify the estimated effect of aflatoxin standards in 15 importing (four developing) countries on exports from 31 countries (21 developing).⁸⁴ The authors concluded that “adopting a worldwide standard for aflatoxin B1 ... based on current international guidelines is found to increase the cereal and nut trade among the countries studied by US\$ 6.1 billion from the 1998 levels. ... total world exports would rise by US\$ 38.8 billion if an international standard (Codex) were adopted, compared to the current divergent national standards in place.”⁸⁵ They further concluded that harmonization of this food safety standard at a level more stringent than one suggested by international standards indicates that “food safety standards can severely limit developing country exports.”⁸⁶ This study thus provides some empirical proof to the long-standing belief that harmonized standards would facilitate international trade.⁸⁷

As noted earlier, Article 3 of the SPS Agreement requires of members to “base” their SPS measures “on international standards, guidelines or recommendations” developed by institutions like Codex and OIE. The purpose of Article 3 is to harmonize SPS measures on as wide a basis as possible, a purpose that has been identified in the preamble of the SPS Agreement. Article 12 of the SPS Agreement also establishes a Committee on SPS Measures whose tasks include “furtherance of [the Agreement’s] objectives, in particular with respect to harmonization” and “encourag[ing] the use of international standards, guidelines and recommendations by all Members”.⁸⁸ The Committee is explicitly required to develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.⁸⁹

This way, it was hoped that “a roster of objective, scientifically based” standards would be developed which would then serve as “a potential safeguard for developing countries against developed nation efforts to disguise trade barriers as safety standards.”⁹⁰ In the words of the WTO Appellate Body, “[t]he ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both ‘necessary to protect’ human life or health and ‘based on scientific principles’, and without requiring them to change their appropriate level of protection.”⁹¹

⁸⁴ Aflatoxins are toxic compounds that contaminate foods such as cereals and nuts and “have been associated with acute liver carcinogens in humans”. See John Wilson and Tsunehiro Otsuki, *Global Trade and Food Safety: Winners and Losers in a Fragmented System*, World Bank Policy Research Working Paper No. 2689, (October 2001).

⁸⁵ See *Id.*

⁸⁶ See *Id.* p. 20.

⁸⁷ Already in the early 1900s, food trade associations made attempts “to facilitate world trade through the use of harmonized standards”. See FAO/WHO, *Understanding the Codex Alimentarius* (1999), available at <http://www.fao.org/docrep/w9114e/W9114e03.htm>. This incidentally appears to have happened soon after the so-called “new era of long-distance food transportation” was ushered in by “the first international shipments of frozen meat from Australia and New Zealand to the United Kingdom” in the late 1800s. *Id.*

⁸⁸ See Article 12:1 and 2 of *SPS Agreement*.

⁸⁹ See Articles 3(5) and 12(4) of the *SPS Agreement*.

⁹⁰ See James Steinberg and Michael Mazarr, *Developing Country Participation in Transnational Decision-making: Lessons for IT Governance*, pp. 5-6, available at www.markle.org/downloadable_assets/lessons_it_governance.pdf. The authors add, however, that “in practice ... developing nation influence has remained weak.”

⁹¹ See AB report in *Hormones*, para. 177.

The practical significance of this requirement has been clarified by the WTO AB in the EC Beef Hormones case, where it highlighted the distinction between national standards based on international standards and those that conform to international standards. The AB ruled that the SPS Agreement only imposes a requirement to base national measures on international standards and not necessarily to conform to such standards. As long as members demonstrate that their measures are built upon international standards such as by incorporating “only some, not all, of the elements of the standard”, they have satisfied their requirements under Article 3.⁹² Interpreting a similar language under Article 2.4 of the TBT Agreement,⁹³ the AB further clarified that “there must be a very strong and very close relationship between two things in order to be able to say that one is ‘the basis for’ the other.”⁹⁴ According to the AB, a national measure that contradicts with an international standard cannot be said to have been based on that international standard.⁹⁵

However, although the SPS Agreement does not oblige countries to incorporate international standards in full, it has an in-built incentive scheme designed to encourage them to do exactly that. This incentive comes in the shape of a favourable legal presumption under Article 3.2, which provides that national measures that conform to international standards, guidelines or recommendations “shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.”

In cases where countries decide to maintain sanitary measures that result in a higher level of protection than would be achieved by measures based on the relevant international standards, they will need to base them on risk assessment⁹⁶ and have “a scientific justification”.⁹⁷ Indeed, Article 5:7 of the SPS Agreement contemplates a situation in which countries may adopt provisional SPS measures on a precautionary basis “in cases where relevant scientific evidence is insufficient”. This is an expression of the precautionary principle in the field of health regulation.⁹⁸ Under such circumstances, countries are required to be actively seeking additional information necessary for an objective assessment that would lead to a definitive determination of

⁹² See AB report in *Hormones*, para. 164.

⁹³ The *TBT Agreement* also recognizes the importance of international standards and, like the *SPS Agreement*, requires that Members use relevant international standards “as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.” See *TBT Agreement* preamble paras. 3 and 4 and Art. 2.4.

⁹⁴ AB report in *Sardines*, para. 245.

⁹⁵ AB report in *Sardines*, para. 249.

⁹⁶ The *SPS Agreement* defines risk assessment to mean the following: “The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.” See Paragraph 4 of Annex A of the *SPS Agreement*.

⁹⁷ See *SPS Agreement* Article 3.3.

⁹⁸ The AB observed in *EC Beef Hormones* that the precautionary principle “finds reflection in Article 5.7 of the *SPS Agreement*” but that it “has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement.” Appellate Body Report, *EC – Hormones*, paras. 123-124. More recently, the *EC Biotech* panel recognized that “provisions explicitly or implicitly applying the precautionary principle have been incorporated into numerous international conventions and declarations” but concluded that the question of whether the precautionary principle constitutes a recognized principle of general or customary international law is still a matter of ongoing debate on which it refrained from taking a position. See *EC Biotech* panel report, paras. 7.88-7.89.

the issues within a reasonable time. Neither the precautionary measures nor those that go beyond international standards will benefit from the legal presumption of consistency with the SPS Agreement.

The importance of the distinction between presumption of consistency of measures based on international standards and recognition of members' right to introduce standards stricter than those based on international standards and its implications for the standard-setting institutions of OIE and Codex was obvious from the outset, but its practical ramifications became clearer only gradually. Not only did the SPS Agreement recognize them as institutions that set their standards, guidelines and recommendations as scientifically justified benchmarks 'against which national measures and regulations are evaluated', it also effectively transformed the status of these instruments to international standards with potential serious legal consequences. In the words of Codex, since 1995 its standards "have become an integral part of the legal framework within which international trade is being facilitated through harmonization. Already, they have been used as the benchmark in international trade disputes, and it is expected that they will be used increasingly in this regard."⁹⁹

As the Appellate Body has shown in *EC Beef Hormones*, this does not mean that the SPS Agreement has made Codex or OIE standards mandatory rules that every WTO member country must adopt.¹⁰⁰ Yet, the recognition still carries serious legal consequences. At the procedural level, conformity with international standards automatically results in a legal presumption that it is consistent with the relevant provisions of the SPS Agreement and of the GATT. This in effect means that the burden to rebut this legal presumption, i.e. to prove that the measures, despite being in full conformity with the international standards, are inconsistent with any provisions of the SPS Agreement or GATT, will shift from the respondent back to the complainant. Although theoretically possible, this is unlikely to succeed in WTO dispute settlement and a WTO Member that adopts an international standard in its entirety is likely to survive any WTO legal challenge whatsoever. However, the only obligation under the SPS Agreement is for WTO members to "base" their national standards on international standards, and not necessarily to fully adopt, and therefore conform to, such international standards. To the extent they limit themselves only to the former, they do not benefit from any presumption of conformity and the standard procedure in terms of burden of proof, etc. will apply.

To sum up, from the perspective of IGAD and other developing countries, three points are worth emphasising here. Firstly, despite its aim "to improve the human health, animal health and phytosanitary situation in all Members",¹⁰¹ the SPS Agreement does not require WTO members to have any SPS laws, let alone impose a minimum SPS standard that they have to put in place. Secondly, despite its aim to minimize the negative effects of standards on trade through establishment of "a multilateral framework of rules and disciplines" to guide their development, adoption and enforcement, countries are still free to adopt their standards unilaterally, going beyond what is provided by the recognized international standard setting institutions.

⁹⁹ See *Understanding Codex* (1999) *supra* n. 87.

¹⁰⁰ Reversing the *EC Beef Hormones* panel ruling on this subject, the AB observed that harmonization of WTO Members' SPS measures on the basis of international standards is only "a goal, yet to be realized in the future" and "to read Article 3.1 as requiring Members to harmonize their SPS measures *by conforming those measures with international standards*, guidelines and recommendations, *in the here and now*, is, in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex *recommendatory* in form and nature) with *obligatory* force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the *SPS Agreement* itself sets out no indication of any intent on the part of the Members to do so." See AB report in *Hormones*, para. 165.

¹⁰¹ See *SPS Agreement* preamble, para. 2.

And, finally, the AB has specifically recognized a WTO member's right to "determine its own appropriate level of protection to be 'zero risk'",¹⁰² which by definition rules out the concept of proportionality between the interest pursued (i.e. 100% protection from risk) and the harm that this could inflict (e.g. its impact on the economic condition of those countries that are not able to satisfy every SPS requirement that may be imposed in the pursuit of such goals).¹⁰³

As will be demonstrated below, IGAD member states lack the technical capacity to satisfy Codex and OIE standards. The moment different developed countries impose different standards of their own that go beyond these international standards, as they have already done in several areas,¹⁰⁴ the challenge for IGAD member states becomes insurmountable. The IGAD livestock sector has been particularly a victim of such development. To this extent, efforts by IGAD member states to raise the health standards of their livestock products with a view to meeting importing country standards could be illusory and perhaps not worth the effort. Developed countries still set standards with a view as much to protecting their consumers against unsafe food as protecting the domestic food producer from foreign competition. Seen from this perspective, one wonders whether the SPS Agreement has done anything at all to resolve developing country concerns.

2.3 IGAD and International Standard-Setting Institutions Relevant to Livestock

The livestock industry is one in which two of the three standard-setting scientific institutions identified by the SPS Agreement directly converge - the OIE on animal health and Codex on food safety standards.¹⁰⁵ In general terms, the OIE deals primarily with animal health and Codex with food safety. But, sometimes, it can be difficult to draw the line in the livestock product chain between where OIE standards end and Codex standards begin. A simple example is the case of zoonoses, i.e. diseases that can be transmitted from animals to humans including through food. The OIE has the primary mandate for zoonoses but, to the extent these can also affect food safety, they also fall under the Codex mandate. Another example would be animal feed. While it appears at first sight that animal feed is a matter for the OIE, it is also obvious that what the animals are fed may ultimately determine whether the meat of

¹⁰² See AB report in *Australia Salmon*, para. 125.

¹⁰³ A World Bank paper quantifies the impact of standards on aflatoxins implemented by the EU on food exports from African countries. The authors find that the implementation of new EU standards that are higher than those suggested by Codex "will have a significant negative impact on African exports of cereals, dried fruits and nuts to Europe. The EU standard, which would reduce health risk by approximately 1.4 deaths per billion a year, will decrease these African exports by 64% or US\$ 670 million in contrast to regulation set at an international standard." See John Wilson, Tsunehiro Otsuki, and Mirvat Sewadeh, *A Race to the Top? A Case Study of Food Safety Standards and African Exports*, World Bank Policy Research Working Paper No. 2563 (February 2001). For similar observations, see Tim Josling, Donna Roberts and David Orden, *Food Regulation and Trade: Toward a Safe and Open Global System* (Institute for International Economics, Washington, DC, 2004), p. 47.

¹⁰⁴ For example, "US and Canadian regulations regarding meat and cattle imports from countries with BSE were, and still are, much stricter" than those recommended by the OIE. See Loppacher and Kerr, *supra* n. 37, p. 430. At a Codex review meeting, several developing countries complained that "many of their problems in trade arose from the fact that trading partners did not apply Codex standards and that as a result they had to meet a variety of different national requirements applied by importing countries." See <http://www.fao.org/docrep/meeting/005/W9809E/w9809e08.htm>.

¹⁰⁵ Note that the *TBT Agreement* also recognizes international standard-setting organizations such as Codex provided their membership is "open to the relevant bodies of at least all Members" of the WTO. Codex has thus been recognized as an international body within the meaning of paragraph 4 of Annex 1 of the *TBT Agreement* by the *Sardines* panel and its *Standard for Canned Sardines and Sardine-type Product* as relevant standard for purposes of Article 2.4 of the *TBT Agreement*. See *Sardines* panel report, paras. 7.65-7.70.

the animals could cause any food hazards down the food chain. Codex thus has a code of practice on good animal feeding whose aim is “to help ensure the safety of food for human consumption through adherence to good animal feeding practice at the farm level and good manufacturing practices (GMPs) during the procurement, handling, storage, processing and distribution of animal feed and feed ingredients for food producing animals.”¹⁰⁶ Likewise, it is no wonder that the OIE identified food safety as a “high priority area” for its 2001-2005 strategic plan.¹⁰⁷ Thus, although the OIE and Codex are supposed to deal respectively with the farm and fork ends of the food chain,¹⁰⁸ these two ends may not always be easy to separate and the risks of overlap and duplication of standards and the possibility of inconsistent standards coming from these two institutions have been recognized. It was in appreciation of these challenges that the OIE established in 2002 a permanent Working Group on Animal Production Food Safety (APFS) in order to “coordinate the food safety activities of the OIE and to ensure a seamless cooperation with Codex”.¹⁰⁹ This section provides a general background about these two institutions using relevant standards to illustrate the nature and effect of such standards and the extent to which IGAD member states are able to make use of them to enhance their export opportunities.

2.3.1 The World Organization for Animal Health (OIE)

Established in 1924, the OIE is an important player in the field of international trade in animals and animal products. The OIE was created in response to the rinderpest outbreak in Europe in the early 1920s, but its disease coverage has always been broader and open-ended. The Organic Statute of the OIE identified nine types of animal diseases: rinderpest, rabies, foot and mouth disease (FMD), glanders, contagious bovine pleuropneumonia (CBPP), dourine, anthrax, swine fever, and sheep pox. Of these, rinderpest and FMD were singled out as diseases of the highest priority and members undertook the obligation to notify immediately the first outbreak of these two diseases. The overall list of diseases as well as the priority list has come a long way since 1924.¹¹⁰ The OIE membership has also grown from 28 in 1924 to 168 countries today. Although no sub-Saharan country was present at its founding,¹¹¹ all seven IGAD member states are now members of the OIE.

The highest decision making organ in the OIE is the International Committee that is composed of “technical representatives” of member countries and every member has one vote. The Committee meets at least once a year and its day-to-day operation is managed by the Central Bureau headed by a Director General. An Administrative Commission made up of the President and vice-President of the International

¹⁰⁶ See Codex, *Code of Practice on Good Animal Feeding* (CAC/RCP 54-2004)

¹⁰⁷ See Willem Drovers, “OIE philosophy, policy and procedures for the development of food safety standards”, in 25(2) *OIE Scientific and Technical Review* (OIE, 2006) pp. 805-812.

¹⁰⁸ Willem Drovers noted that, in the farm to fork animal product chain, the OIE focuses on “protecting consumers from food-borne hazards arising from animals at the primary production level of the food chain (‘farm’)” while Codex is “focusing on human health outcomes (‘fork’)”. *Id.* p. 806.

¹⁰⁹ See Drovers, *Id.* P. 806. For further information on the collaborative activities of the OIE and Codex in the development of food standards, see S. Slorach, “Assuring food safety: the complementary tasks and standards of the World Organisation for Animal Health and the Codex Alimentarius Commission”, in 25(2) *OIE Scientific and Technical Review* (OIE, 2006) pp. 813-821.

¹¹⁰ The OIE notifiable diseases list for terrestrial animals today contains 23 multiple species diseases, 15 cattle diseases, 11 sheep and goat diseases, 13 equine diseases, seven swine diseases, 14 avian diseases, two lagomorph (e.g. rabbits) diseases, six bee diseases and two other diseases. See OIE listed diseases 2007 set out in Chapter 2.1.1. of the Terrestrial Code.

¹¹¹ The founding members are: Argentina, Belgium, Brazil, Bulgaria, Denmark, Egypt, Spain, Finland, France, Great Britain, Greece, Guatemala, Hungary, Italy, Luxemburg, Morocco, Mexico, Monaco, the Netherlands, Peru, Poland, Portugal, Rumania, Siam, Sweden, Switzerland, the Czechoslovak Republic, and Tunisia. See preamble to the OIE Agreement of 1924.

Committee, the immediate Past-President, two auditors and four representatives of member countries elected by the Committee represents the Committee during the intervals.¹¹²

Article 4 of the 1924 OIE Statute lists three main objectives for the Office: “[1] to promote and co-ordinate all experimental and other research work concerning the pathology or prophylaxis of contagious diseases of livestock for which international collaboration is deemed desirable; [2] to collect and bring to the attention of the Governments or their sanitary services, all facts and documents of general interest concerning the spread of epizootic diseases and the means used to control them; and [3] to examine international draft agreements regarding animal sanitary measures and to provide signatory Governments with the means of supervising their enforcement.”¹¹³ These objectives have evolved over time and the OIE official website identifies five areas of work today: (1) to ensure transparency in the global animal disease situation; (2) to collect, analyse and disseminate veterinary scientific information; (3) to provide expertise and encourage international solidarity in the control of animal diseases; (4) to safeguard world trade by publishing health standards for international trade in animals and animal products; and (5) to improve the legal framework and resources of national veterinary services. Indeed, as noted earlier, the OIE has gradually expanded its sphere of activity beyond animal health and has increasingly become a player in the development of food safety standards. The development of “standards aimed at protecting consumers from food-borne hazards arising from animals at the primary production level of the food chain”¹¹⁴ is thus currently one of its major responsibilities.

The role of the OIE in international trade has always been significant, but its mandate in this field received a huge boost from the WTO SPS Agreement which specifically refers to the OIE as one of three scientific institutions compliance with whose standards creates several legal implications within the WTO system itself. A key player in the development of sanitary standards relevant for the livestock industry is the OIE Terrestrial Animal Health Commission. The first task listed in the Commission’s terms of reference is “to promote the adoption by the International Committee of animal health (including zoonoses), animal welfare and animal production food safety standards, guidelines and recommendations concerning trade or international movement of mammals, birds and bees, and their products.” These standards, guidelines and recommendations are “designed to minimise the risks of transmitting diseases ... while avoiding unjustified sanitary barriers.”¹¹⁵ The key challenge for the OIE thus lies here – how to minimise the genuine risk of disease transmission without creating an excuse for otherwise protectionist measures. The tool used by the OIE to achieve this goal lies, in principle, with science, but many observers agree that science may not always be used as neutrally as would be assumed; several factors, including commercial interests, also play a significant role in the standard development process.¹¹⁶

In its fight against animal diseases, the OIE until recently maintained a classification of diseases into two broad categories based on their risk gravity – Category A diseases, which covered some 15 of the most dangerous ones, including rinderpest, FMD and Rift

¹¹² See Article 8 of the *Organic Statutes of the Office International des Epizooties* (appended to, and an integral part of, the *International Agreement for the Creation of an Office International des Epizooties in Paris*, Done in Paris, 25 January 1924) and Article 8 of the General Rules of the OIE of 24 May 1973.

¹¹³ See *Id.* Article 4 of the *Organic Statutes of the OIE*.

¹¹⁴ See Droppers, *supra* n. 107, P. 810.

¹¹⁵ See http://www.oie.int/tahsc/eng/en_tahsc.htm.

¹¹⁶ See for example Thorsten Hüller and Matthias L. Maier, “Fixing the Codex? Global Food-Safety Governance Under Review” in Christian Joerges and Ernst-Ulrich Petersmann (eds.) *Constitutionalism, Multilateral Trade Governance and Social regulation* (Oxford 2006) pp. 267-299.

Valley fever, and Category B diseases, which included such other diseases as anthrax and rabies. This has changed now and all diseases are put in a single OIE list of notifiable diseases. For almost all notifiable diseases, the OIE, through its Specialist Commissions, develops two types of animal health standards - trade standards and biological standards.¹¹⁷ The most important standard for our purposes is what is called the Terrestrial Animal Health Code, which aims "to assure the sanitary safety of international trade in terrestrial animals (mammals, birds and bees) ... and their products." It does this "through the detailing of health measures to be used by the veterinary services or other competent authorities of importing and exporting countries in establishing health regulations for the safe importation of animals and animal products. Such measures aim to avoid the transfer of agents pathogenic for animals and/or humans, without the imposition of unjustified trade restrictions."¹¹⁸

Pursuing its philosophy that disease freedom is the best guarantee of safety, the OIE has since the 1990s developed detailed procedures by which countries or parts thereof could be recognized as free of some of the most contagious and economically damaging animal diseases, thereby becoming the only international body that can confer a disease-free status on countries or zones within countries for such diseases. OIE recognition of a country or part of it as disease-free is considered "essential" for countries that engage in international trade; indeed this can be the single most important factor in an otherwise resource-rich country's ability to export its animals and animal products.

The OIE has so far established an official list of disease-free countries for four of the most important animal diseases - FMD, rinderpest, CBPP and BSE. Three of these diseases (i.e. except BSE), together with RVF, have effectively crippled IGAD member states' ability to export livestock products for a long time. The challenge posed by sanitary standards is best illustrated by the fact that "producers in most of the world, including China, Mexico, and Japan, cannot export chicken meat to the United States because of the danger of infecting U.S. flocks with Exotic Newcastle disease."¹¹⁹ If such highly developed countries as Japan cannot satisfy US sanitary requirements, one has to wonder whether it makes any sense to think about potential livestock exports from the IGAD region to the advanced countries.

Precisely because of this problem, a growing number of experts question the very philosophy of the global approach to animal health and food safety. They argue that disease-free status, while certainly a worthy goal in itself, is not necessarily the most efficient way to achieve food safety. Product safety rather than disease control and/or eradication is the goal of existing rules of international trade, and an acceptable degree of safety can be achieved by following a commodity-based approach with proper sanitary and hygiene regulation, certification and inspection mechanisms. An acceptable level of product safety can be achieved without necessarily achieving a disease-free status.¹²⁰

¹¹⁷ The biological standard for terrestrial animals is called the *Manual of Diagnostic Tests and Vaccines for Terrestrial Animals* which provides "a harmonised approach to disease diagnosis by describing internationally agreed laboratory diagnostic techniques." See OIE International Standards, available at <http://www.oie.int/eng/normes/guide%20to%20OIE%20intl%20standards%20v6.pdf>.

¹¹⁸ *Id.*

¹¹⁹ *Id.* John Dyck and Kenneth Nelson, "Structure of the Global Markets for Meat", Economic Research Service, U. S. Department of Agriculture, *Agriculture Information Bulletin No. 785*, 2003, p. 8.

¹²⁰ See for example G. Thomson *et al.*, "International trade in livestock and livestock products: the need for a commodity-based approach", 55 (14) *The Veterinary Record* (2004) pp. 429-433. See also Ian Scoones and William Wolmer, *Livestock, Disease, Trade and Markets: Policy Choices for the Livestock Sector in Africa*, IDS Working Paper 269 (June 2006). According to AU-IBAR, "there are simple, realistic and achievable alternatives to improving access to high value livestock commodity markets without the necessity of first eradicating all 'epizootic diseases'." AU-IBAR, "Improved Market Access for African Livestock Commodities", *Policy Briefing Paper No. 11*.

2.3.1.1 Animal Diseases and IGAD Livestock Trade

As noted earlier, the animal disease situation of the IGAD region is perhaps the single most important reason why the livestock wealth of the region has not been translated into meaningful export revenues for those countries. Kenya's Livestock Minister Joseph Munyao identified animal disease as one of two "major challenges" affecting Kenya's export opportunities in the sector, the other being marketing infrastructure, and considers the "creation of disease-free zones as one of the vital strategies for addressing the issues of access to international markets."¹²¹ The same policy direction is being pursued by Ethiopia and Sudan.

Many of the most contagious animal diseases are already endemic in the IGAD region. This section provides a summary of the status of IGAD member states in terms of just three livestock diseases: rinderpest, FMD, and Rift Valley fever. The purpose of this section is to demonstrate how the OIE approach to particular diseases works and how IGAD member states are affected by this approach. The three diseases discussed here have been selected due to their significance to the region, but a number of other almost equally significant diseases are not covered.¹²²

2.3.1.1.1 Rinderpest

Rinderpest is one of the most contagious viral animal diseases whose severity persuaded the world to get together and establish the OIE in 1924. As a disease of the highest priority, rinderpest also received the most attention and perhaps resources over the past several decades and is the animal disease that is closest to complete eradication from the world.¹²³

The OIE has a three-step process by which countries achieve the status of freedom from rinderpest: (1) self-declaration by a country that it is provisionally free from rinderpest (which can be done after the country is 'satisfied that it is free from rinderpest and that the disease is unlikely to be re-introduced'); (2) OIE declaration that a country is free from rinderpest disease following international verification of the claims of countries (which takes place at least three years after a country has declared itself provisionally free from rinderpest); and (3) OIE declaration that a country is free from rinderpest infection (which takes place at least one year later and subject to stricter criteria).¹²⁴ Any country or zone that does not qualify for any one of the above categories of disease freedom is considered a rinderpest-infected country.¹²⁵

From the perspective of international trade, the OIE has detailed guidelines on what veterinary authorities of importing countries need to do in respect of rinderpest

¹²¹ See Munyao speech, *supra* n. 12.

¹²² For example, prevalence of CBPP in Africa is believed to be one of the obstacles against livestock exports from the continent so much so that, according to some experts, it is "either the first or second most important disease in pastoral systems of the Masai and Afar and ranked as second or third in importance by the agropastoralists in Ethiopia". See Jonathan Rushton, Anni McLeod and Juan Lubroth, "Managing transboundary animal disease", *FAO Livestock Report 2006* (Rome 2006), pp. 29-44. Kenya's Ministry of Livestock lists the following as "the most important notifiable diseases in Kenya": FMD, Anthrax, CBPP, Rabies, Lumpy Skin Disease, Contagious Caprine Pleuropneumonia (CCPP), New Castle Disease, East Coast Fever and Trypanosomiasis. It also noted that rinderpest has not been reported for over ten years. See *Draft Sessional Paper*, *supra* n. 33, p. 26.

¹²³ The FAO currently has what is called the Global Rinderpest Eradication Programme (GREP) which aims to eliminate rinderpest from the world by the year 2010. For more information on this project, see <http://www.fao.org/ag/AGInfo/programmes/en/grep/home.html>.

¹²⁴ For the details, see Chapter 2.2.12 and Appendix 3.8.2 of the *Terrestrial Animal Health Code – 2006*.

¹²⁵ Article 2.2.12.5. of the *Terrestrial Code* provides: "When the requirements for acceptance as an infection free country, a disease free country or zone, or a provisionally free country or zone are not fulfilled, a country or zone shall be considered as infected."

depending on the disease status of the exporting country - i.e. infection free, disease free, provisionally disease-free or infected. For example, according to Article 2.2.12.7 of the Terrestrial Code, when importing from infection-free countries, veterinary administrations should require, for ruminants and swine, the presentation of an international veterinary certificate attesting that the animals showed no clinical sign of rinderpest on the day of shipment and remained in an infection-free country since birth or for at least 30 days prior to shipment. If the imports come from a disease-free rather than an infection-free country or zone, however, additional conditions have to be met, such as the requirement that they be subjected to a diagnostic test on two occasions with negative results, at an interval of not less than 21 days.¹²⁶ The conditions get more stringent for imports from countries that are declared provisionally free or still infected. The conditions applying to the importation of livestock products such as meat are different from those applying to live animals, in many cases requiring that the animals be slaughtered in an approved abattoir and prescribing transport conditions and removal of lymphatic glands.¹²⁷

Rinderpest is believed to have been eradicated from the whole of Africa except a corner of the IGAD region along the common border region of Ethiopia, Kenya and Somalia.¹²⁸ However, only Eritrea has so far achieved OIE recognition as being free from rinderpest infection; Sudan and Uganda have achieved the second level, i.e. status of being free from rinderpest disease and are presumably now working towards achieving recognition for freedom from rinderpest infection.¹²⁹ Djibouti, Ethiopia and Kenya¹³⁰ have the status of self-declared provisional freedom from rinderpest disease either for the whole country or for specified zones according to the provisions of Chapter 2.2.12. of the Terrestrial Code.¹³¹ This means that livestock products from major IGAD exporters like Ethiopia and Somalia will have to satisfy the more stringent requirements set by the OIE for countries that are considered either infected or only provisionally free. The effect very often is total denial of access to a large number of foreign markets, including virtually all developed countries.

The irony is inescapable when one considers the role of rinderpest in IGAD livestock export trade, particularly to Europe. History has recorded that the disease first entered Ethiopia in 1887 through Massawa on the Red Sea coast "from Indian cattle for the Italian army", which had established its colony over the coastal province of Ethiopia at the time, which it renamed Eritrea in 1890.¹³² The effect was devastating; Ethiopia is believed to have lost about 95% of its cattle, which triggered one of the

¹²⁶ See Article 2.2.12.8 of the Terrestrial Code.

¹²⁷ See Articles 2.2.12.18 to 2.2.12.22 of the Terrestrial Code.

¹²⁸ Discussions with officials of the AU-IBAR, Nairobi, on 06 September 2006.

¹²⁹ See Bryony Jones, "The OIE Pathway to Freedom from Rinderpest: current status of Southern Sudan", October 2006, p. 23, available at <http://www.vsf-belgium.org/dzf/view/en/395>.

¹³⁰ According to Aklilu, Kenya once had OIE-recognized disease-free zones in the Central regions, but this status was later lost because much of the infrastructure built by the Livestock Marketing Department (LMD) and the Kenya Meat Commission (KMC) fell into disrepair. See Yacob Aklilu, *An Audit of the Livestock Marketing Status in Kenya, Ethiopia and Sudan* (Nairobi, April 2002, Vol. II), p. 6. According to Professor Leonard, the more serious problem was corrupt movement of animals from diseased to disease-free zones. He argued that maintenance of the disease-free zone was difficult, inter alia, because: "Livestock prices were higher inside it because of the privileged access to market that it brought. The temptations to evade the quarantine were high. ... [T]here were too many incentives for too many people to use influence or bribes to evade the quarantine." David Leonard, *African Successes: Four Public Managers of Kenyan Rural Development* (Berkeley: University of California Press, c1991) available at <http://ark.cdlib.org/ark:/13030/ft8p3008fh>, p. 165.

¹³¹ See OIE, *OIE official 'disease-free' status*, http://www.oie.int/eng/info/en_peste.htm?e1d6#free.

¹³² According to Ethiopian historian Bahru Zewde, "the famine started as a result of the outbreak of a rinderpest epidemic triggered by Italian importation of infected cattle through Massawa." See Zewde, *A History of Modern Ethiopia 1855—1974* (Ohio University Press, Ohio 1991) p. 72.

worst human tragedies in the country's history. The degree of starvation and famine that this disease triggered, which was exacerbated by drought, is such that it is still remembered as kefu qan, which literally means the 'evil days'.¹³³ Italian colonialism in the region ended with World War II, but the disease it introduced over a century ago remains to this day as one of the main obstacles against IGAD livestock exports to Europe and beyond.

2.3.1.1.2 Foot and mouth disease (FMD)

According to the OIE, FMD is one of the most contagious viral diseases that affects cloven-hoofed mammals and has a great potential to cause severe economic loss.¹³⁴ FMD has always been a priority disease for the OIE. Not only was this one of two high-priority diseases identified by the OIE constituent document in 1924, the other being rinderpest,¹³⁵ it was also the first disease for which the OIE established an official list of disease free countries without vaccination in 1996. This, according to the OIE, is "due to its highly contagious nature and economic importance for many countries".¹³⁶ The impact of an FMD outbreak can be devastating to the economy of a country. The 2001 FMD outbreak in the UK was estimated to have cost over US\$ 9.2 billion to the British economy.¹³⁷ A 2001 USDA study put FMD as one of the two "most serious" animal diseases today, along with BSE.¹³⁸

The OIE has a procedure by which a country or a zone within a country can be recognized as FMD-free without vaccination or FMD-free with vaccination. Any country or zone that does not satisfy the requirements for either of these options is considered an FMD-infected country.¹³⁹ To be recognized as FMD-free without vaccination, a country must have a record of regular and prompt animal disease reporting and send a declaration to the OIE stating that: there has been no outbreak of FMD during the past 12 months; no evidence of FMDV infection has been found during the past 12 months; and no vaccination against FMD has been carried out during the past 12 months. Furthermore, such a country must also supply documented evidence that surveillance for both FMD and FMDV infection is in operation, regulatory measures for the prevention and control of FMD have been implemented and that it has not imported, since the cessation of vaccination, any animals vaccinated against FMD.¹⁴⁰ The trade reward for such an achievement comes in the form of lighter demands from the veterinary authorities of importing countries, such as, for live animal imports, the presentation of an international veterinary certificate attesting that the animals showed no clinical sign of FMD on the day of shipment, were kept in an FMD-free country or zone, where vaccination is not practised, since birth or for at least the past three months, and have not been vaccinated.¹⁴¹ FMD-infected countries, on the other hand, must provide a veterinary certificate with several additional requirements

¹³³ International Atomic Energy Agency, *History of battle against rinderpest*, available at <http://www-naweb.iaea.org/nafa/aph/stories/2005-rinderpest-history.html>.

¹³⁴ See http://www.oie.int/eng/info/en_fmd.htm. The impact of FMD on livestock differs from place to place and species to species. For more on this, see B. Perry and K. Rich, "Poverty impacts of foot-and-mouth disease and the poverty reduction implications of its control", 160 *The Veterinary Record* (2007), pp. 238-241.

¹³⁵ See Article 5 the *Organic Statutes of the OIE*, *supra* n. 112.

¹³⁶ See http://www.oie.int/eng/info/en_fmd.htm?e1d6.

¹³⁷ See N. Morgan and A. Prakash, "International livestock markets and the impact of animal disease", in 25(2) *OIE Scientific and Technical Review* (OIE, 2006) p. 520.

¹³⁸ See Dale Leuck, *The New Agricultural Trade Negotiations: Background and Issues for the U.S. Beef Sector* (US Economic Research Service, 2001) p. 6, available at <http://www.ers.US.gov/publications/ldp/dec01/ldp8901.pdf>.

¹³⁹ See Articles 2.2.10.2 to 2.2.10.6 of the Terrestrial Code.

¹⁴⁰ See Article 2.2.10.2 of the Terrestrial Code.

¹⁴¹ See Article 2.2.10.9 of the Terrestrial Code.

including proof of isolation in an establishment or quarantine station for 30 days prior to shipment and proof of diagnostic tests on all animals for evidence of FMDV infection with negative results at the end of that period.¹⁴² The difference in the sanitary requirement for the importation of fresh meat products between those coming from FMD-free countries and those from FMD-infected countries is even starker.¹⁴³

As of November 2007, about 59 countries are recognised as FMD-free, where vaccination is not practised, and two others as FMD-free with vaccination. No African country appears in either list except the islands of Madagascar and Mauritius. Botswana, Namibia and South Africa are the only African countries in a list of eight with FMD-free zones where vaccination is not practised. No African country appears in the list of five countries having FMD free zones with vaccination.¹⁴⁴

The FMD status of a country plays a decisive role in its livestock export performance so much so that the market is effectively controlled by those countries that have acquired disease-free status. As reiterated, there is no guarantee that developed countries in particular necessarily allow imports from other countries just because the latter satisfy the OIE requirements in respect of a particular disease. The EU, for example, does not allow any imports of live domestic biungulate animals from countries that vaccinate against FMD, or where the disease is present, regardless of any preventive measures taken by the country of origin.¹⁴⁵ This, by definition, means that no live domestic biungulates can be imported to the EU from virtually the entire African continent. As a 2003 USDA study observed, the distinction between countries judged FMD-free and those judged not free “largely defines world trade in fresh, chilled, or frozen beef and pork. For most of the last 50 years, the FMD-free zone consisted chiefly of the United States, Canada, Australia, New Zealand, Japan, South Korea, Taiwan, and Denmark. Most trade in uncooked beef and pork occurred among these areas....”¹⁴⁶

The OIE’s World Animal Health Information Database (WAHID), although not up-to-date, gives a broad picture of the FMD situation in the IGAD region. WAHID contains information for 2006 only for Eritrea and Ethiopia and, in both cases, there were confirmed FMD infections but no clinical disease was found. On Kenya there is information only until 2005, and there was a confirmed clinical disease in that year, albeit limited to certain zones. Kenya reported in 2004 that FMD was the most important disease restricting its trade in livestock products and it was establishing export processing zones (areas of low disease risk) in order to address this problem.¹⁴⁷ For Sudan, too, there is information only up to 2005 and there were only suspected cases in that year without confirmation. But Sudan reported two FMD outbreaks in 2004.¹⁴⁸ There was no FMD information on Somalia or Uganda¹⁴⁹ for 2005 and 2006 while no FMD was reported in Djibouti in 2006.¹⁵⁰

¹⁴² See Article 2.2.10.11 of the Terrestrial Code.

¹⁴³ Compare Article 2.2.10.19 against Article 2.2.10.22 of the Terrestrial Code: the former deals with importation of fresh meat from FMD-free countries without vaccination and sets only two conditions; the latter deals with importation of fresh meat from FMD-infected countries and has about ten detailed and onerous conditions attached to it.

¹⁴⁴ For the latest information, see http://www.oie.int/eng/info/en_fmd.htm?e1d6#Liste.

¹⁴⁵ See EC Commission, Health & Consumer Protection Directorate-General, *General guidance on EU import and transit rules for live animals and animal products from third countries*, available at: http://ec.europa.eu/food/international/trade/guide_thirdcountries2006_en.pdf, p. 7.

¹⁴⁶ Dyck and Nelson, *supra* n. 119, p. 8.

¹⁴⁷ See OIE, *World Animal Health 2004* (Paris 2004), p. 211. In the same year, Kenya reported 95 new outbreaks of SAT1, SAT2 and O types of foot and mouth disease. *Id.* p. 210.

¹⁴⁸ See *Id.* p. 316. According to the report of Sudan to the OIE, “Four of the seven known serotypes of foot and mouth disease (FMD) have been reported in Sudan: the European types O in 1989 and A in 1983 and the South African Territories virus types SAT1 in 1981 and SAT2 in 1979. In 1990, the virus was not typed.” *Id.*

Despite several efforts,¹⁵¹ the IGAD member states remain obvious victims of this disease. We shall see in Chapter 3 that many countries invoke FMD as their reason for banning imports from the IGAD region. But it is worthwhile to mention here that several actual or potential export markets for IGAD livestock products are officially FMD-infected countries. For example, there were confirmed clinical cases of FMD in Kuwait in 2006, and in Oman, Qatar, and Saudi Arabia in 2005, the most recent year for which WAHID has information for these countries.¹⁵² Interestingly, the OIE's comparison of countries' sanitary situations puts FMD as one of the diseases that are present in both exporting (e.g. Ethiopia) and importing countries (e.g. Saudi Arabia) and "therefore unlikely to be trade hazards".¹⁵³ We shall see in the next section however that Saudi Arabia invoked FMD as one of two reasons for banning livestock imports from virtually all African countries.¹⁵⁴

2.3.1.1.3 Rift Valley Fever

Rift Valley fever (RVF) is one of the most dangerous zoonotic diseases that is endemic to the IGAD region with a "historic distribution" in sub-Saharan Africa and the Arabian Peninsula. According to the WHO, RVF is a viral disease that spreads amongst animals primarily by the bite of infected mosquitoes. The RVF virus may then infect people either when they are bitten by infected mosquitoes, or through contact with the blood, other body fluids or organs of infected animals.¹⁵⁵

The OIE has procedures through which a country or zone within the historic distribution regions of the world could be considered free of RVF infection or RVF-infected but without disease.¹⁵⁶ Once again, the RVF status of a country determines the type of conditions set and information required by the authorities in importing countries.

A country or zone is RVF infection-free if it lies outside of and not adjacent to the historically infected regions, or if a surveillance programme has demonstrated no evidence of RVF infection in humans, animals or mosquitoes in the country or zone during the past 4 years following a RVF epidemic. An RVF-infected country could be considered a country without the disease provided the disease has not occurred in humans or animals in the past 6 months and provided further that climatic changes predisposing to outbreaks of RVF have not occurred during this time. Unlike the cases of rinderpest or FMD, a country is considered to be infected with the disease only if a clinical disease in humans or animals has occurred within the past 6 months.¹⁵⁷ In other words, while a country is presumed infected with FMD and rinderpest until it proves its freedom, a country is presumed RVF-free until infection is proven. Also, the

¹⁴⁹ But Uganda reported disease outbreak in 2004 including foot and mouth disease, Newcastle disease, African swine fever, rabies, contagious bovine pleuropneumonia, lumpy skin disease, blackquarter, trypanosomosis, anthrax and brucellosis. The outbreaks were "associated with movement of livestock in search of water and pastures." *World Animal Health 2004*, *supra* n. 147, p. 349.

¹⁵⁰ See WAHID Interface at <http://www.oie.int/wahid-prod/public.php?page=home>.

¹⁵¹ For example, Kenya had special legislation on how to deal with FMD since at least 1948 (see *The Animal Diseases (Foot-and-Mouth Disease) Rules*, Cap. 213 (1948), Sub. Leg.) and since 1966, Kenya's DVS has had power to declare whole regions as compulsory FMD vaccination zones under the 1966 *Animal Diseases (Compulsory Foot and Mouth Vaccination) Rules* (as amended). See L.N.185/1966, L.N.252/1967, L.N.229/1970, L.N.158/1975, L.N.100/1980.

¹⁵² See WAHID, *supra* n. 150.

¹⁵³ See http://www.oie.int/wahid-prod/public.php?page=trade_status.

¹⁵⁴ See table from Saudi Arabia's Protocol of Accession to the WTO, *infra* at Chapter 3.

¹⁵⁵ For more on the disease, see the WHO Fact Sheet at <http://www.who.int/mediacentre/factsheets/fs207/en/index.html>.

¹⁵⁶ See Article 2.2.14.2 of the Terrestrial Code.

¹⁵⁷ See Articles 2.2.14.2 to 2.2.14.4 of the Terrestrial Code.

OIE maintains a list of countries declared free of FMD and rinderpest, as it does for BSE and CBPP, but there is no such official list for RVF. Although this is partly a result of the gravity of the problem at the global level, and partly RVF's limited historical and geographical distribution, it is clear that RVF sits near the top of the priority list of IGAD member states while, for example, BSE - one of the most high profile and devastating diseases at the global level - does not have any history of occurrence in the IGAD region. This is another indication of the fact that diseases that cause the highest damage for a region such as IGAD may not necessarily be the priorities for the OIE.

The RVF virus was first identified in Kenya in the 1930s¹⁵⁸ and has since served as one of the most recurring and damaging causes of trade restrictions against IGAD livestock exports to the Middle East and other regions. RVF was for the first time reported outside of the African Continent in September 2000, when it caused several animal and human deaths in Saudi Arabia and Yemen. According to the WHO, by late October 2000, 85 deaths had been reported in Saudi Arabia and 80 in Yemen.¹⁵⁹ It is thus hardly surprising that this incident led to the imposition of the longest livestock import bans by six Middle Eastern countries - Saudi Arabia, Bahrain, Oman, Qatar, Yemen and the United Arab Emirates - from mainly IGAD member states.¹⁶⁰ The ban was lifted the following year in all countries except Saudi Arabia,¹⁶¹ where it remained in place until December 2006. Strangely enough, the lifting of the Saudi ban coincided closely with another outbreak in Kenya. According to WHO reports, as of 30 January 2007, this outbreak had caused 121 deaths in northern Kenya alone.¹⁶² Once again, this outbreak was also immediately followed by meat and live animal import bans from many of the same Middle East countries, a move that affected virtually all IGAD member states despite the fact that the outbreak was confined to Kenya and the adjoining areas of Somalia. Although many Middle East countries are believed to have imposed a ban on live animal imports, Oman is the only country that reported the measure to the WTO as required under the SPS Agreement.¹⁶³ According to this report, Oman imposed the ban as an emergency measure effective 10 January 2007 in order to prevent the entry of Rift Valley fever virus. This is an open-ended measure that is meant to remain in place "until the danger ceases to exist". All IGAD member states but Djibouti have been specifically identified as countries affected by the measure. At the time of writing (June 2007), all indications are that this latest ban is still in place.¹⁶⁴ The effect of such bans is felt by everyone in the livestock food chain, and

¹⁵⁸ Pan-African News Agency, 31 January 2007, as reported in *Africa Research Bulletin* (January 16th–February 15th 2007 issue) at p. 17270.

¹⁵⁹ See WHO, "Rift Valley fever in Saudi Arabia - Update 3", 25 October 2000 available at http://www.who.int/csr/don/2000_10_25/en/index.html and "2000 - Rift Valley fever in Yemen - Update 4", 26 October 2000 available at http://www.who.int/csr/don/2000_10_26/en/index.html.

¹⁶⁰ See *Horn of Africa Food Security Update: October 20, 2000*, available at http://www.fews.net/centers/files/East_200009en.pdf. This is believed to be the first ever reported RVF outbreak outside Africa.

¹⁶¹ See FAO, *Support to Livestock Exports from the Horn of Africa (EXCELEX) Project* (GCP/INT/811/ITA): Tripartite Evaluation Report (August 2005), p. 1, available at http://www.fao.org/docs/eims/upload/212289/GCPINT811ITA_2005I.doc.

¹⁶² See WHO, "Rift Valley Fever in Kenya and Somalia - update 3", 31 January 2007, available at http://www.who.int/csr/don/2007_01_31/en/index.html. See also PANA 31 January 2007, as reported in *Africa Research Bulletin* (January 16th–February 15th 2007 issue) at p. 17270.

¹⁶³ See WTO, *Notification of Emergency Measures by Oman* (G/SPS/N/OMN/10) 16 January 2007.

¹⁶⁴ Note that in an effort to arrest the spread of disease, it is common and generally accepted practice that import bans are also imposed by IGAD member countries against livestock products coming from fellow IGAD members. For example, Kenya reportedly imposed quarantine restrictions on certain parts of the country and banned livestock and meat imports from Ethiopia and Somalia following the RVF outbreak in late 2006. See "Kenya bans meat imports from Ethiopia, Somalia", *The Reporter* (Addis Ababa, 10 February 2007).

particularly the poor producers. Companies engaged in meat exports from Ethiopia reported a loss of as much as 80% of their export business, while the price of beef, mutton and goat meat on the domestic market reportedly went down by as much as 15-25% within a matter of months following the import ban.¹⁶⁵

2.3.2 Codex Alimentarius Commission

Set up in 1963 jointly by FAO and WHO, the Codex Alimentarius Commission (hereafter Codex) is one of the key players in international food trade. It is the principal global institution that has the mandate to develop international food safety and hygiene standards. Codex was set up to implement the Joint FAO/WHO Food Standards Programme whose purposes include protecting consumer health, ensuring fair practices in the food trade and coordinating the development and harmonization of food standards.¹⁶⁶ Codex today has 169 member countries.

Since its creation, Codex had the twin objectives of protecting the consumer against food-borne diseases and encouraging international trade in safe food through the harmonization of food standards.¹⁶⁷ The first FAO Regional Conference for Europe in October 1960, which played a central role in the creation of Codex, stated that it recognized: “[t]he desirability of international agreement on minimum food standards and related questions (including labelling requirements, methods of analysis, etc.) ... as an important means of protecting the consumer’s health, of ensuring quality and of reducing trade barriers, particularly in the rapidly integrating market of Europe”.¹⁶⁸

The Codex Commission normally holds one regular session each year and its work in the interim is carried out by an Executive Committee composed of the Chairperson and three vice-chairpersons of the Commission, seven regional coordinators (for Africa, Asia, Europe, Latin America and the Caribbean, Near East, North America and South-West Pacific) and another seven people, one selected from each of these regions.¹⁶⁹ Each Codex member has one vote and decisions are taken by a majority of votes cast.¹⁷⁰ Most of the actual work of the Commission is however carried out through a number of subsidiary bodies, called Codex Committees and sometimes mainly ad hoc intergovernmental task forces. The committees are generally of three types: (1) general or horizontal committees (with relevance for all or most types of food); (2) commodity or vertical committees (for specific foods or classes of foods); and (3) regional coordination committees that deal with standards of particular interest for particular regions.

The way the Committees are run is quite unique to Codex. The Committees are normally hosted by individual member countries that are ‘willing’ “to accept financial and all other responsibility, as having responsibility for appointing a chairperson of the Committee.”¹⁷¹ Furthermore, such a host country “is responsible for providing all conference services” including a secretariat with adequate administrative support staff, translation facilities, and other logistics at its own expense. Such a costly undertaking however comes with its own privileges. As host to a Codex committee, such country has every opportunity to shape the agenda and influence the outcome of the Committee’s activities. And the Committees have important powers, including

¹⁶⁵ See Wudineh Zenebe, “Meat Market Hits Bottom of the Barrel”, *Addis Fortune* (Addis Ababa) March 27, 2007.

¹⁶⁶ See Codex Statute and its Rules of Procedure available in the Codex Procedural Manual at http://ftp.fao.org/codex/Publications/ProcManuals/Manual_15e.pdf.

¹⁶⁷ A full list of Codex Official standards is available at: http://www.codexalimentarius.net/web/standard_list.do?lang=en.

¹⁶⁸ See <http://www.fao.org/docrep/w9114e/W9114e03.htm> (emphasis added).

¹⁶⁹ See Articles IV and V of the Rules of Procedure of the Codex Commission.

¹⁷⁰ See Article VIII of the Rules of Procedure of the Codex Commission.

¹⁷¹ FAO/WHO, *Codex Procedural Manual* p. 49.

everything from the drawing up of a list of priorities for their activities down to preparation of draft Codex standards within their terms of reference to the review and revision of existing standards.¹⁷² Hence, the observation that “the SPS Agreement has politicized decision making within Codex more than in the other standards organizations.”¹⁷³

Codex rules of procedure provide that decisions are taken by a simple majority of members present at a meeting, although, in practice, it usually decides by consensus. Indeed, Codex never resorted to a vote to adopt a standard until 1995,¹⁷⁴ when it adopted the standard on maximum residue limits for five growth hormones (beef) by a tight margin of 33 votes in favour, 29 against and 7 abstentions.¹⁷⁵ It is no coincidence that this happened on hormones that were (1) already at the centre of a bitter dispute between the US and the EC, and (2) in the year of entry into force of the WTO Agreements that significantly enhanced the legal status of the otherwise voluntary Codex standards, thereby putting the long-standing US-EC dispute in a different legal landscape.¹⁷⁶

2.3.2.1 Codex Standards and IGAD Livestock Trade

Pursuing its objective of promoting trade in safe food, Codex has over the past four decades developed over 300 product-specific and general standards, guidelines and recommendations. These standards are often extremely technical and detailed. The Codex General Standard for Food Additives¹⁷⁷ is a good example here. This standard is the authoritative source for the type of additives that are “recognized as suitable for use in foods”. For each additive that is so recognized, the standard sets the conditions under which they may be used, assigns an Acceptable Daily Intake (ADI) level, and prescribes maximum use levels for food additives in various food groups with a view to ensuring that the intake of an additive from all its uses does not exceed its ADI. To illustrate this with examples from livestock products, the maximum use level for Ascorbyl Esters, an antioxidant, in edible casings such as sausage casings, is limited to 5000 mg/kg. Likewise, the maximum use level for Benzoates, a preservative, in cured (including salted) and dried non-heat treated processed comminuted meat, poultry, and game products is set at 1000 mg/kg. Finally, the maximum use level for Carmines, a colouring additive, in fresh meat, poultry, and game is 500 mg/kg while the maximum use level for the same additive in fermented non-heat treated processed comminuted meat, poultry, and game products is 100 mg/kg.¹⁷⁸ The Maximum Use

¹⁷² *Id.*

¹⁷³ See Josling et al, *supra* n. 103, p. 43.

¹⁷⁴ See Michael Livermore, Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius, 81:2 *New York University Law Review* (2006), pp. 766-801.

¹⁷⁵ See UNCTAD, *A Positive Agenda for Developing Countries: Issues for Future Trade Negotiations* (New York and Geneva, 2000), p. 321, available at http://www.unctad.org/en/docs/itcdtsb10_en.pdf.

¹⁷⁶ Note that consensus is generally the rule in the international standardization community, but for purposes of the WTO, the procedure by which a standard is set – i.e. whether by majority voting or by consensus – does not matter as regards its relevance for purposes of the *TBT Agreement*. See *Sardines* panel report (para. 7.90) and AB report (para. 227).

¹⁷⁷ See *Codex Stan 192-1995*. A food additive is defined to mean “any substance not normally consumed as a food by itself and not normally used as a typical ingredient of the food, whether or not it has nutritive value, the intentional addition of which to food for a technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food results, or may be reasonably expected to result (directly or indirectly), in it or its byproducts becoming a component of or otherwise affecting the characteristics of such foods. The term does not include contaminants or substances added to food for maintaining or improving nutritional qualities.” *Id.* Para 2(a).

¹⁷⁸ For the full list of standards, see “Additives Permitted for Use Under Specified Conditions in Certain Food Categories or Individual Food Items”, Table One of *Codex Stan 192-1995*, pp. 67-141.

Level for each additive is the highest concentration of the additive “determined to be functionally effective in a food or food category and agreed to be safe by the Codex Alimentarius Commission.”¹⁷⁹ Another example, which has more to do with promoting standardization and fair trade than food safety, would be the standard for ‘cooked cured chopped meat’ in which 50% of the meat used is required to be in the form of coarsely cut pieces “equivalent to meat ground through holes of not less than 8 mm in diameter” and no piece “greater than 15 mm in any one dimension”.¹⁸⁰

But, Codex guidelines could also be general and sometimes full of constitutional-sounding provisions. A good example could be the Codex general guidelines for food import control systems, which suggest that national systems should have, inter alia, requirements for imported food that are consistent with requirements for domestic foods; competent authorities with clearly defined responsibilities; clearly defined and transparent legislation and operating procedures; and precedence to the protection of consumers.¹⁸¹ The Codex Principles for Food Import and Export Inspection and Certification¹⁸² could be another example where Codex appears to prescribe principles of due process in public administration. Written in the year of the entry into force of the WTO Agreement, these principles seem to echo the language of the SPS Agreement. They provide, inter alia, that: food inspection and certification systems should be designed and operated on the basis of objective risk assessment¹⁸³; in undertaking a risk assessment or in applying the principles of equivalence, importing countries should give due consideration to statements by exporting countries on a national or area basis of freedom from food-related disease; countries should avoid arbitrary or unjustifiable distinctions in the level of risk deemed to be appropriate in different circumstances so as to avoid discrimination or a disguised restriction on trade; countries should be prepared to recognise the equivalence of other inspection/certification systems provided the exporting countries demonstrate such equivalence; and finally and most directly, in the design and application of food inspection and certification systems, importing countries should provide some form of special and differential treatment for the benefit of developing countries. Other general standards of horizontal application include those on food labelling, maximum residue levels for pesticides and veterinary drugs, and guidelines for the establishment of regulatory programmes.¹⁸⁴

It is worth pointing out that livestock and livestock product exports from the IGAD region are still largely in the form of live animals and fresh or chilled meat. Codex does not have any standards for such products. To this extent, one could argue that these products are subject only to OIE standards and Codex standards are irrelevant for this study. This is however only partly true.

Firstly, IGAD member states have a vested interest in adding value to their exports from a commercial perspective.¹⁸⁵ Secondly and more importantly, the export of processed livestock products also has the potential to mitigate the adverse effect of their animal disease status as live animals and fresh meat are more likely to be banned for reasons of disease transmission than processed products. The fact that Codex also sets more general standards, such as the Code of Hygienic Practice for

¹⁷⁹ *Id.* P. 2.

¹⁸⁰ See *Codex Standard for Cooked Cured Chopped Meat Codex Stan 98-1981* (Rev.1 1991). Such standards would fall under the *TBT Agreement* rather than the SPS Agreement.

¹⁸¹ See Codex, *Guidelines For Food Import Control Systems* (CAC/GL 47-2003, REV.1-2006).

¹⁸² See CAC/GL 20-1995, adopted by the Codex Alimentarius Commission at its 21st Session, 1995, available at http://www.codexalimentarius.net/download/standards/37/CXG_020e.pdf.

¹⁸³ The Principles define risk assessment to mean “the evaluation of the likelihood and severity of adverse effects on public health arising, for example, from the presence in foodstuffs of additives, contaminants, residues, toxins or disease-causing organisms.” See *Id.* para. 5.

¹⁸⁴ See www.codexalimentarius.net.

¹⁸⁵ For more on this, see *infra* Chapter 3.

Meat, also means that Codex is an extremely relevant institution for IGAD today and not just in the remote future. This Code covers everything from the hygiene of the environment in which animals grow, the feed they eat, their manner of transportation to slaughterhouses to the design and construction of the slaughter area, the entire food chain after slaughter and a traceability requirement back to the beginning.¹⁸⁶ Finally, Codex standards that set detailed requirements for animal feed or the maximum veterinary residue levels are also directly relevant for the exportation of live animals and fresh meat.¹⁸⁷

2.4 IGAD and the Global Regulatory Framework

We have seen that international trade in food products in general and livestock products in particular is subject to an intricate network of binding international treaties, soft law international standards, guidelines and recommendations and national regulatory regimes. In this section, we will attempt to assess the extent to which IGAD member states participate in the rule-setting process whether at the WTO or the standards institutions of the OIE and Codex. We will also highlight that IGAD member states have been unable to meet most of the requirements set by these regulatory instruments.

2.4.1 IGAD membership in the WTO, Codex and OIE

A country must first become a member of an international organization before it can legitimately influence the process and outcome of decision making in that organization. In principle, it also works the other way round - i.e. no decision of an international organization can have effect on a sovereign country unless that country wilfully decides to become a member thereof. In reality, however, the latter is easier said than done, and the more so in the field of international trade rules and standards. Compliance with product standards set by international organizations can become a precondition to access foreign markets, *de facto* if not *de jure*. Indeed, this is an area where even standards set by non-governmental international organizations could determine a country's ability to participate in international trade. As the OECD put it, "although ... private standards are voluntary and not required by law, they are required for doing business, thus *de facto* mandatory."¹⁸⁸ For developing countries, non-compliance with international standards almost inevitably leads to complete marginalization from the trade-led process of globalization.

Of the three principal organizations covered here, the OIE enjoys the membership of all seven IGAD member states, Codex stands second with five IGAD members and the WTO has only three of them.

¹⁸⁶ A closer look at the *Code of Hygienic Practice for Meat* shows that compliance with its requirements would significantly enhance the export opportunities of IGAD countries for live animals and fresh meat. The Code covers hygiene provisions for raw meat, meat preparations and manufactured meat *from the time of live animal production* up to the point of retail sale. See Codex, *Code of Hygienic Practice for Meat* (CAC/RCP 58-2005), para. 6. On traceability, the Code stipulates that "Animal identification systems, to the extent practicable, should be in place at primary production level so that the origin of meat can be traced back from the abattoir or establishment to the place of production of the animals." See *Id.* para. 20.

¹⁸⁷ See for example Codex, *Maximum Residue Limits for Veterinary Drugs in Foods* (updated July 2006) CAC/MRL 02-2006; and *Code of Practice on Good Animal Feeding*, CAC/RCP 54-2004.

¹⁸⁸ See WTO, *Private Voluntary Standards and Developing Country: Market Access (preliminary results) Communication from OECD* (G/SPS/GEN/763, 27 February 2007), para. 1. An FAO report also pointed out that large retailer and processor standards and certification schemes simply "require compliance, or the market is closed. Thus these private schemes become *de facto* mandatory schemes for certain types of products in certain markets." See FAO, *Food Safety and Animal and Plant Health: Trends and Challenges for Latin America and the Caribbean* (LARC/06/3, 2006), para. 38.

IGAD Membership in the WTO, Codex and OIE

Country	WTO	Codex	OIE
Djibouti	X		X
Eritrea		X	X
Ethiopia		X	X
Kenya	X	X	X
Somalia			X
Sudan		X	X
Uganda	X	X	X

2.4.2 Participation of IGAD Member States in the WTO, Codex and OIE

Membership is a necessary, but not sufficient, condition for a country to influence the process and outcome of decision making in international organizations. Each of these organizations deals with highly technical and complex issues in its own right, but a full understanding of the role played by each of these institutions in the livestock sector also requires an appreciation of how they interact amongst themselves, as well as with other global institutions operating in the field. The interaction among institutions operating at global, regional, national and local levels adds another dimension to the issues. It is thus easy to appreciate that the effectiveness of individual IGAD member states' participation in the establishment and evolution of this global regulatory framework is significantly constrained by the poor state of their human, financial, technological and institutional capacity.¹⁸⁹

A regional forum such as IGAD could play a crucial role in the effort to address many of these problems. For example, we have seen that the animal disease status of IGAD member states is one reason why IGAD livestock wealth has not been able to generate proportionate export revenues for these countries. Thanks partly to ecological characteristics that nearly all IGAD member states share in common, the main animal diseases are also equally shared among these countries. An IGAD-wide approach to address the impact of such diseases would go a long way towards addressing many of the problems, ranging from pooling of technical expertise and establishment of well-resourced regional technical institutions and laboratories to the coordination of diplomatic positions potentially as far as collective accreditation of diplomats to act on behalf of the region. This is an approach that is already being encouraged by the international organizations under examination here.¹⁹⁰

This is, however, more of a distant dream for the region at present. IGAD as a bloc plays virtually no role at the international level in the field of international trade. Apart from possible informal and casual coordination between two or more countries that may happen on occasion, each member state speaks on its own behalf in such fora. Indeed, there is nothing like an IGAD-wide common policy and legal framework for trade in livestock products and all that can be said here is limited to whatever there is in the form of general statements of aspiration and non-binding declarations of intent about the desirability of setting up common policies in all sorts of areas

¹⁸⁹ The Codex evaluation report in 2002 found that 96% of low-income countries and 87% of middle-income countries "do not participate in Codex to the extent they think desirable, the overwhelming reason given being lack of financial resources". See FAO/WHO, *Report of the Evaluation of the Codex Alimentarius and Other FAO and WHO Food Standards Work* (2002), available at http://www.who.int/foodsafety/codex/en/codex_eval_report_en.pdf, p. 14, para. 24.

¹⁹⁰ The 2002 Codex evaluation report recommended, for example, that "to enhance developing country involvement, as well as that of other countries, encouragement should be given to regional economic groupings and other groups of countries with common interests to develop common positions. In this context, the possibility for one country to speak in meetings on behalf of several countries should also be encouraged, as should committee co-chairs and meetings held in developing countries." *Id.* p. 8, para. 18.

including closer economic integration.¹⁹¹ Article 13A(h) of the IGAD Agreement provides, inter alia, that members undertake to “work towards the promotion of trade and gradual harmonization of their trade policies and practices and the elimination of tariff and non-tariff barriers to trade so that it can lead to regional economic integration.” The areas of potential cooperation identified by this provision are wide-ranging, covering agriculture and food security, different dimensions of the environment, fiscal, investment and monetary policies, energy and scientific policies and many more. However, a strategy document adopted by the Summit of Heads of State and Government in October 2003 identified three priority areas as “the immediate entry points for cooperation”. These are: (1) food security and environmental protection; (2) conflict prevention, management and resolution; and (3) economic cooperation and integration.¹⁹² Although each of these three priority areas will have direct or indirect bearing on the livestock sector, there are no specific plans for policy coordination in the sector.

2.4.3 IGAD and the International Standard-Setting Organizations

The OIE and Codex, just like most other international organizations of any political or economic significance, are dominated by the developed countries. Out of a membership of about 169 countries in Codex today, around 30% do not normally send a delegation to its plenary meetings.¹⁹³ The OIE traditionally gets a better attendance record from developing countries, partly because it normally covers the participation costs of representatives from these countries, but the effectiveness of their participation is often weak.¹⁹⁴

The main factors behind the ineffective representation of developing countries in such key institutions include weak scientific, technical and institutional capacities, which ultimately reflect the meagre human and financial resources of many of these countries. Several multilateral and bilateral initiatives have been launched to address this problem, such as the Standards and Trade Development Facility (STDF),¹⁹⁵ the FAO/WHO Trust Fund for Participation in Codex,¹⁹⁶ and the Integrated Framework

¹⁹¹ See Agreement establishing the Inter-Governmental Authority on Development of March 1996 (hereafter the IGAD Agreement), available at http://www.igad.org/docs/agreement_establishing_igad.pdf.

¹⁹² See *IGAD Strategy* (Djibouti, October 2003), p. 2, available at http://www.igad.org/docs/igad_strategy.pdf.

¹⁹³ See Hüller and Maier, *supra* n. 116, p. 272. Hüller and Maier further noted that “In many instances that have been investigated to date, the making of Codex standards and guidelines has been dominated by the United States on the one hand, and the EU and its member states on the other, with countries from other regions of the world playing only a secondary role as allies to one or the other camp.” *Id.* P. 273. They nonetheless conclude that “the extent to which developing countries are disadvantaged in Codex decision-making is difficult to gauge.” *Id.* P. 275.

¹⁹⁴ For more on this, see Michael Nelson, *International Rules, Food Safety, and the Poor Developing Country Livestock Producer* (PPLPI Working Paper No. 25, 2005).

¹⁹⁵ The STDF was established by the FAO, the OIE, the World Bank, the WHO and the WTO as “a global programme in capacity building and technical assistance to assist developing countries in trade and SPS measures.” See <http://www.standardsfacility.org>. All IGAD countries except Somalia have benefited from some form of assistance from the STDF. For a list of all beneficiary countries, see http://stdfdb.wto.org/ben_dcs.asp.

¹⁹⁶ The main objective of the Codex Fund is “to help developing countries and those with economies in transition to enhance their level of effective participation in the development of global food safety and quality standards by the Codex Alimentarius Commission.” See <http://www.who.int/foodsafety/codex/trustfund/en/index1.html>. Again, all IGAD countries except Somalia have received support to participate in Codex meetings and other activities over the past few years. For a list of the countries that participated in Codex activities supported by the Codex Fund, see <http://www.who.int/foodsafety/codex/prog5e.pdf>.

(IF).¹⁹⁷ Each of these and the many other initiatives are certainly steps in the right direction. However, the problems of developing countries in general, and those of IGAD in particular, in the standards area are only one manifestation of broader economic and social problems that cannot be overcome through piecemeal projects and initiatives. A lasting solution can only come from, and as part of, overall economic development.

In an attempt to get a broad picture of the extent of participation of IGAD member states in the standard-setting process at the international level, this section looks at two specific subjects: the extent of their representation in Codex committees and their attendance records at Codex Commission¹⁹⁸ meetings over the past five years for which annual reports are available (for the years 2001 to 2006, except 2002). The assumption is that, in broad terms, the higher the number of people representing a country in such fora, the better its chances to participate more effectively in the process and even influence the outcome in its favour. This can be further enhanced or diminished by the expertise of individual delegates, the continuity of people making up the national delegations as well as the relevance of the particular section of government they come from.

As noted earlier, Codex operates mainly through committees that prepare draft standards for submission to the Commission. These committees can be general subject committees or commodity committees. Each committee is hosted by a member country, "which is chiefly responsible for the cost of the committee's maintenance and administration and for providing its chairperson."¹⁹⁹ Only one of 13 Codex commodity committees listed on the Codex web page is hosted by a developing country - Mexico - while some developed countries host more than one.²⁰⁰ The horizontal committees, i.e. those dealing with general subjects, are hosted fully by developed countries.²⁰¹ The significance of hosting commodity or other committees can hardly be overstated. It is the host country that administers the whole standard setting process including the privileged position of permanently chairing the Committees.

¹⁹⁷ The IF was first established in 1997 by six multilateral institutions (IMF, ITC, UNCTAD, UNDP, World Bank and the WTO) to support LDCs in the multilateral trading system by helping them integrate trade into their national development plans and "to assist in the co-ordinated delivery of trade-related technical assistance in response to needs identified by the LDC." See <http://www.integratedframework.org/about.htm>. The role played by the IF in the IGAD countries is already significant. Given that all IGAD countries except Kenya are LDCs, we now have extremely valuable studies, known as Diagnostic Trade Integration Studies (DTIS), completed for Djibouti, Ethiopia and Uganda and a concept paper done for Sudan. All these studies are freely available for download at: <http://www.integratedframework.org/index.html>.

¹⁹⁸ As noted earlier, two of the seven IGAD countries – Djibouti and Somalia – are not members of Codex. See WTO, G/SPS/GEN/49/Rev.7, 26 July 2006.

¹⁹⁹ See <http://www.fao.org/docrep/w9114e/W9114e04.htm>.

²⁰⁰ The following committees are listed on the Codex website: Cereals, Pulses and Legumes (United States), Fats and Oils (United Kingdom), Fish and Fishery Products (Norway), Fresh Fruits and Vegetables (Mexico), Meat Hygiene (New Zealand), Milk and Milk Products (New Zealand), Processed Fruits and Vegetables (United States), Cocoa Products and Chocolate (Switzerland), Natural Mineral Waters (Switzerland), Processed Fruits and Vegetables (United States), Vegetable Proteins (Canada), Sugars (United Kingdom), Processed Meat and Poultry Products (Denmark), Soups and Broths (Switzerland), and Vegetable Proteins Canada). See <http://www.fao.org/docrep/w9114e/W9114e04.htm>.

²⁰¹ The list includes the following committees: on General Principles (hosted by France), on Food Labelling (Canada), Methods of Analysis and Sampling (Hungary), on Food Hygiene (United States), on Pesticide Residues hosted by the Netherlands, on Food Additives and Contaminants (the Netherlands), on Import/Export Inspection and Certification Systems (Australia), on Nutrition and Foods for Special Dietary Uses (Germany), and on Residues of Veterinary Drugs in Food (United States). See <http://www.fao.org/docrep/w9114e/W9114e04.htm>.

In Appendix I, an attempt has been made to tabulate information on IGAD member states' representation at Codex Commission annual meetings for the five year period (between 2001 and 2006 except 2002).²⁰² The attendance records of IGAD member states show that Kenya, Sudan and Uganda attended all five sessions; Eritrea attended three of the five (i.e. except the 27th and 24th sessions) and Ethiopia attended only two of them (the 28th and 26th).²⁰³

However, the data on attendance tell us only part of the story and, in this technical field, the number of people as well as their professional qualification or expertise in the field matter even more. While, admittedly, it is difficult to measure the effectiveness of each member's participation in Codex activities by simply looking at the number of people, it can nonetheless provide some rough indications. Accordingly, in terms of the number of people in each delegation, Sudan leads with an average of six people for each of the last four years (2003-06 inclusive) and two in 2001; Kenya follows with between two people in 2001 and seven people in 2006; Uganda comes third with two people in four of the five years, and four people in 2006; Eritrea sent one person in 2003 and 2006 and two in 2005; and finally comes Ethiopia with just one delegate for 2003 and 2005.

In terms of continuity - i.e. how repeatedly a country sends the same officials to Codex Commission sessions - Uganda is notable in that it was represented by the same two people for four of the five years covered here, possibly indicating institutional stability, continuity and expert representation. Ethiopia once again comes last on this as a country that sent different people each time while the other three countries fall somewhere between these two.

Finally, Codex being a technical organization, the extent to which people working in relevant fields are delegated to participate in its annual sessions is indicative of the degree to which a country has made an effort to benefit from its membership and exercise a certain degree of influence in its decisions. So, in terms of the relevance of the government department where delegates come from, Kenya, Sudan and Uganda appear to have done relatively well, while Eritrea and Ethiopia do not seem to have taken the forum seriously. Eritrea sent a qualified delegate, a Director-General in charge of Codex matters in its Ministry of Agriculture, in 2005 and 2006, while Ethiopia appears to have done this only once - i.e. in 2005 when it sent the Director-General of its Quality and Standards Authority. In other cases, both countries sent diplomats who were less likely to have the specialized technical expertise to participate effectively in Codex activities.

We can see just from this brief exercise that the challenge facing IGAD's livestock industry is not just the unfavourable global regulatory framework, whose terms are dictated by the rich; but that IGAD member states themselves have contributed to their declining influence in the making of this global framework. The reasons are understandable, but so also are the solutions. It is clear beyond doubt that the financial, human and technical constraints to effective participation may be insurmountable to individual member states, acting on their own. That is where a regional organization such as IGAD could, and should, be used to pool resources and deploy them for the common good. This can be done at both the technical-scientific level and at the level of diplomatic representation in the relevant global fora.

²⁰² The usefulness of the table has been limited by several factors. Firstly, although the Commission is the highest decision-making organ, most of the work is in fact done at the committee stage, which has not been covered in this table. Secondly, inconsistent spelling of names in the Codex reports has sometimes made it necessary to exercise the author's discretion on the basis of other relevant information, which may not always be accurate.

²⁰³ See ALINORM 06/29/41 for the 29th session (3-7 July 2006), ALINORM 05/28/41 for the 28th session (4-9 July 2005), ALINORM 04/27/41 for the 27th session (28 June – 3 July 2004), ALINORM 03/41 for the 26th session (30 June – 7 July 2003), and ALINORM 01/41 for the 24th session (2-7 July 2001). All reports are available at <http://www.codexalimentarius.net/web/archives.jsp?lang=en>.

2.4.4 IGAD and the WTO

Three IGAD member states (Djibouti, Kenya and Uganda) are members of the WTO, two (Ethiopia and Sudan) are negotiating entry and the remaining two (Eritrea and Somalia) are completely outside the system.²⁰⁴ Whatever one's views about the benefit of WTO membership for poor countries such as these, the rules set at the WTO affect the trade interests even of countries that are not its members. Moreover, no country can defend its interests in the WTO without becoming a member. But, again, membership alone is not enough to exercise influence in the WTO, and we shall see that even those IGAD member states that are also members of the WTO do not seem to play an active role in terms of coordinating positions and reflecting the broader interests of IGAD as a regional grouping. This certainly needs to change, and change urgently. Even some of the biggest players in global trade such as Australia, Brazil, Canada and India have long realized that coalitions and alliances are the only route to influence GATT/WTO negotiations - as was evidenced in the creation of the Cairns Group during the Uruguay Round and the G20 in the Doha process.

We shall see that IGAD-wide trade interests in the livestock sector are totally neglected at the WTO and the rules of the trading system are being shaped by those who have a vested interest in escalating standards that may not even be scientifically justified.²⁰⁵ The complete absence of an IGAD voice throughout the ten-year-long work of the WTO Working Party for the accession of Saudi Arabia, a natural and prosperous export market for the livestock products of the IGAD member states,²⁰⁶ epitomizes this complete absence of representation for IGAD interests in WTO activities.

The following table is adapted from the Report of the Saudi Arabia WTO Accession Working Party, which provides a complete list of those SPS measures that have been included in the Saudi terms of accession to the WTO in 2005.²⁰⁷

²⁰⁴ There is one official WTO document publicly available about Eritrea and that is a request submitted by Eritrea to participate in the Seattle ministerial 1999 as an observer. See WTO, *Eritrea - Request for Observer Status at the 1999 Ministerial Conference* (WT/L/331, 28/10/1999). There is no document whatsoever on Somalia for understandable reasons to do with the political instability of the country since already before the creation of the WTO.

²⁰⁵ It has been observed, for example, that "the food sector in Argentina and Brazil is confident of its capacity to respond to all EU technical and sanitary requirements in the near future, even if those on traceability pose some problems for Argentina exporters (it is also problematic for other developed countries)." See Jean-Christophe Bureau, Sebastien Jean, and Alan Matthews, "The Consequences of Agricultural Trade Liberalization for Developing Countries: Distinguishing between Genuine Benefits and False Hopes", 5(2) *World Trade Review* (2006) p. 244.

²⁰⁶ The Saudi market is known as "the largest and fastest growing market for high value foodstuffs in the gulf region". See USDA Foreign Agricultural Service, *Saudi Arabia: Food and Agricultural Import Regulations and Standards Update 2006* (GAIN Report Number SA6008, Jul 2006), p. 4.

²⁰⁷ See WTO, *Accession of the Kingdom of Saudi Arabia: Decision of 11 November 2005* (WT/L/627, 11 November 2005). Paragraph 2 of this Protocol incorporates specific commitments referred to in paragraph 315 of the Working Party Report and makes them an integral part of the WTO Agreement. Paragraph 216 of the Working Party Report includes a reference to Annex L of the same report and is included in the list of paragraphs referred to in para 315 of the same. The effect is that the list of SPS measures included in Annex L of the Working Party report is an integral part of the WTO agreement applying to Saudi Arabia's relations with all other member countries.

List of SPS Measures Maintained by the Kingdom of Saudi Arabia

H.S. No.	Description of product	Nature of SPS Measure	Justification	WTO Members and non-Member Country(ies)
0102 010410 010420	Live Bovine Animals Live Sheep Live Goats	Banned because of FMD (Foot and Mouth Disease)	Article 5 of <i>SPS Agreement</i>	All African Countries other than South Africa, South Africa (Northern Province and Mpumalanga, Northern Cape, North West and Kwazulu-Natal), China, India, Malaysia, Yemen, Iran, Iraq, Chinese Taipei, Pakistan, Turkey, Lebanon
0201	Live Bovine Animals	Banned because of Rinder Pest [<i>sic</i>]	Article 5 of <i>SPS Agreement</i>	All African Countries (except South Africa), Pakistan, Iran, Afghanistan, Mongolia
0201 0202 0206...	All types of Bovine Meat and its Products	Banned because of Rinder Pest [<i>sic</i>]	Article 5 of <i>SPS Agreement</i>	All African Countries (except South Africa), Pakistan, Iran, Afghanistan, Mongolia
0201 0202 0206...	All types of Bovine Meat and Its Products	Banned because of FMD (Foot and Mouth Disease)	Article 5 of <i>SPS Agreement</i>	All African Countries (except South Africa), All European Countries, China, Malaysia, Yemen, Iran, Iraq, Jordan, Chinese Taipei, Pakistan, Lebanon
0204 0206...	All types of Sheep and Goat Meat and Their Products	Banned because of FMD (Foot and Mouth Disease)	Article 5 of <i>SPS Agreement</i>	All African Countries (except South Africa, Sudan, Ethiopia), All European Countries, China, Malaysia, Yemen, Iran, Iraq, Jordan, Chinese Taipei, Lebanon

Source: Adapted from: *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization*, WT/ACC/SAU/61, 1 November 2005, Annex L.

It is notable from this that Saudi Arabia had an unconditional ban on imports of livestock products from virtually the whole of sub-Saharan Africa (except South Africa, and in the case of sheep and goat meat, Ethiopia and Sudan). FMD and rinderpest are mentioned as reasons for the ban on live animals. This does not however appear to tally with the OIE disease status of these countries. For example, all bovine animals are banned from Africa, except South Africa, allegedly because of rinderpest, but Eritrea has been declared rinderpest disease-free by the OIE since May 2004, as are several other sub-Saharan African countries such as Botswana, Lesotho, Malawi Namibia, Swaziland and Zimbabwe.²⁰⁸ Nobody challenged Saudi Arabia as to why it banned bovine animal imports from the whole of Africa in the name of rinderpest while so many African countries had already secured a clean bill of health from the only international organization that has the mandate to do this, the OIE.

The same observations could be made about FMD, the other major disease Saudi Arabia invoked as grounds for its import prohibition, but the effectiveness of the WTO forum could be seen from the following simple example. The Saudi list of sanitary measures above includes a ban on the importation of all types of bovine meat and meat products from all African and European countries on FMD grounds. The EC was the only member that challenged Saudi Arabia during the accession process arguing that the EU was free of FMD and asking why all EU countries were included in the ban. This forced Saudi Arabia to undertake a binding commitment to remove the ban from all European countries citing a May 2004 OIE Resolution which restored the EU's FMD-free status.²⁰⁹ The same OIE general session also recognized the rinderpest freedom of several African countries, but there is no record in the Working Party report of any

²⁰⁸ See OIE, Recognition of Member Countries Free from Rinderpest Infection and Rinderpest Disease (Resolution No. XXII, 25 May 2004), available at http://www.oie.int/download/SG/2004/A_RESO_2004_WP.pdf.

²⁰⁹ The Saudi commitment reads as follows: "in pursuance of Resolution No. XX of the International Committee of the OIE, adopted during the 72nd general session (23-28 May 2004), Saudi Arabia had decided to remove the ban on imports of live bovine, ovine and caprine animals, due to Foot and Mouth Disease, from all European countries." See *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization*, WT/ACC/SAU/61, 1 November 2005, para. 221.

African country ever challenging the measures. This fact alone appears to constitute, *prima facie*, an arbitrary and unjustifiable discrimination among different members where the same conditions prevail and thereby also violating the MFN principle as prescribed in Article 2.3 of the SPS Agreement.²¹⁰ Even within IGAD, and given the identical status of all IGAD member states as FMD-infected countries, the selective permission of sheep and goat meat imports from Ethiopia and Sudan and its apparent prohibition from other IGAD member states on grounds of FMD further strengthens our contention that the Saudi bans are discriminatory as between countries where the same conditions prevail.²¹¹ Furthermore, the diseases invoked by Saudi Arabia to justify the ban are also endemic in the Kingdom, thereby arguably raising questions of whether Saudi Arabia is in breach of the national treatment requirement contained in the same Article 2.3 of the SPS Agreement.

Also notable is the fact that Saudi Arabia did not include Rift Valley fever as one of the grounds for the ban on livestock imports from the IGAD region which the country has maintained almost continuously since 2000. The silence of Saudi Arabia on RVF particularly since its accession to the WTO in 2005 contravenes the transparency provisions of Article 7 of SPS Agreement and its Annex B.²¹² Although it is impossible to be certain about the reasons, this may be because of the total absence of effective participation by IGAD member states at the accession negotiations.

All this can have implications for the future of relevant Saudi measures in dispute settlement terms. This is not however to advise IGAD member states to follow the adjudication route. Not only does such advice require a deeper, more careful and more comprehensive legal and political-economy analysis than that which has been done in this paper; such a move is not necessarily in the best interest of the IGAD member states. The purpose of the speculation is more to sensitize IGAD member states about their rights in this respect so they can study the matter further, not just vis-à-vis Saudi Arabia but also all other potential export destinations, and use resulting knowledge to strengthen their bargaining position and, at least, put pressure on such countries to take IGAD concerns more seriously.

In sum, the type of restrictions as well as the commitments contained in the Saudi protocol of accession indicates that IGAD member states with an interest in livestock exports did not play any part in the Saudi negotiations for accession to the WTO.²¹³ This has deprived IGAD member states of a one-off opportunity to influence Saudi policy in the field of livestock trade. The countries that negotiated the bilateral concessions contained in the animals and animal products section of the Saudi

²¹⁰ Article 2.3 of *SPS Agreement* provides: “Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.”

²¹¹ There are also reports that the livestock products from the banned countries have been entering the Saudi market through Yemen with full knowledge of the Saudi authorities. Somaliland Minister of Pastoral Development and Environment, Fu'ad Adan Adde, complained that “the Saudis are taking our animals from Yemen, knowing that the cattle are from the Horn. What they want is an unorganized and cheap supply of animals from the Horn of Africa.” See *The Reporter* (Addis Ababa) 22 July 2006.

²¹² *SPS Agreement* Article 7 provides: “Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.” On transparency in the *SPS Agreement* and how it works, see Robert Wolfe, “Regulatory Transparency, Developing Countries and the WTO” 2(2) *World Trade Review* (2003) 157–182.

²¹³ The membership list of the working party for the accession of Saudi Arabia to the WTO did not have a single country from IGAD, and indeed only two from Sub-Saharan Africa (excluding South Africa), i.e. Nigeria and Senegal, both of which are net-importers of livestock products. See 2005 ITC data for these two countries at ITC (2005).

schedule of concessions²¹⁴ at the WTO, thereby currently holding the Initial Negotiating Rights (INRs) on most of these products, include Australia, Canada, the EC, New Zealand, the US and Uruguay. This could seriously limit the rights of IGAD member states in respect of future changes to Saudi livestock import policy even after all IGAD member states become full members of the WTO.²¹⁵

The bottom line, however, is that the countries that have special interest in this, particularly Ethiopia, Somalia and Sudan, remain outside the WTO, thereby depriving themselves of a credible international forum through which they could protect their interests in this sector. Moreover, the three IGAD member states that are members of the WTO do not seem to be pursuing an aggressive enough approach to protect their present and potential export markets.²¹⁶ A good starting point should be for those IGAD member states still outside the WTO to complete their accession as soon as practicable and for the three IGAD-cum-WTO members to use their status as WTO members to actively support the WTO accession of their fellow IGAD member states.

2.5 Conclusion

This chapter has shown that the livestock sector is subject to an intricate web of regulations and standards emanating from a multiplicity of sources. The two scientific institutions serve a vital purpose in international economic relations - the setting of science-based standards on animal health and food safety as well as creating a benchmark based on which national standards could be developed but also evaluated. The importance of these twin services is beyond doubt but many developing countries are struggling to cope with the system while their trade interests continue to suffer. The influence of the poorest countries on international standard-setting institutions has remained weak for reasons including the following: (1) poor level of attendance in key meetings; (2) inadequate representation in committee leadership as well as secretariat staff positions; and (3) technical complexity of the nature of standards work and the difficulty of implementing such international standards at the national level.²¹⁷ In short, the science-intensive nature of the work of these organizations, coupled with established working mechanisms that blatantly discriminate against developing countries (e.g. the hosting of the Codex committees, which are almost always permanently in the hands of individual developed countries), make meaningful participation practically impossible for IGAD member states. The cumulative result of this inadequate representation and its exclusionary effect on the products of developing countries is that many countries see the two standards institutions as the institutional embodiment of the use of science as a tool to exclude their products from rich country markets.

²¹⁴ See Schedule CLVIII – Kingdom of Saudi Arabia, Nov. 2005, reproduced in Annex II.

²¹⁵ That a WTO member country does not have INRs in another WTO member's tariff concessions on a particular product means, in principle, that the latter may change or withdraw its concessions without consulting the former. See GATT Article XXVIII. The effect of this provision on members without INRs has been tempered down by the Uruguay Round Understanding on Article XXVIII which introduces mechanisms by which members could be given INRs retrospectively but it is difficult to have much hope in this exceptional route for IGAD.

²¹⁶ Gathii argues that Kenya is not paying enough attention to the enforcement of its rights under WTO law. According to Gathii, Kenya, "by failing to take seriously the application and enforcement of trading rules by its trading partners" has also "failed to engage a significant barrier of access to its products." Gathii (2003), p. 200. Gathii illustrates this failure on the basis of EU restrictions imposed on flower imports from Kenya invoking non-compliance with the EU's pesticide maximum residue levels, which Gathii argues is probably inconsistent with the WTO *SPS Agreement*. *Id.* pp. 205-208.

²¹⁷ See Steinberg and Mazarr, *supra* n. 90, pp. 5-6. It is worthy of note at the same time that the current Chairperson of the Codex Commission is Tanzania's Claude Mosha while the three vice-chairpersons are from the US, Malaysia and the Netherlands. See Joint FAO/WHO Food Standards Programme, report of the *Codex Alimentarius Commission Twenty-ninth Session* (ALINORM 06/29/41, Geneva 3-7 July 2006), available at ftp://ftp.fao.org/codex/Alinorm06/al29_41e.pdf.

IGAD member states do not however just face the technical difficulty to meet Codex and OIE standards; many developed countries in fact impose standards that go beyond these international standards.²¹⁸ This already erodes part of the assumption behind the acceptance of the “three sisters” as the international standard setting organizations by the WTO. What is worse, these already superior and nationally divergent standards are supplemented by company- or industry-specific private standards set mainly by supermarkets and groups of companies operating in similar areas.²¹⁹ These standards can be even more complex and difficult to comply with than those set by governments.²²⁰ Researchers have already found that “increasingly, private players are imposing their own standards on importers and producers from developing countries ... [and t]hese requirements exceed public regulations, particularly regarding production processes, certification, and traceability, three areas where the poorest countries are especially handicapped by the lack of capital, infrastructure, and skilled workers.”²²¹

IGAD member states must learn from their experiences in international economic decision-making circles in general that, as Steinberg and Mazarr put it, “coalitions can serve as a route to power.”²²² An IGAD-level collaboration in this field would enable them to: (1) identify sectors of common interest; (2) identify common challenges; (3) create a mechanism by which they can develop common positions; and (4) speak in one voice at these organizations, ideally through a single representative with an IGAD-wide mandate. There may be problems about multiple accreditation as was identified by the Codex review report, but informal coordination of positions and de facto representation of a group of countries by the same person(s) could provide a practical way around such formalistic and procedural hurdles.²²³

²¹⁸ At a Codex review meeting, several developing countries complained that “many of their problems in trade arose from the fact that trading partners did not apply Codex standards and that as a result they had to meet a variety of different national requirements applied by importing countries.” See <http://www.fao.org/docrep/meeting/005/W9809E/w9809e08.htm>.

²¹⁹ According to UNCTAD, there are over 400 private schemes that range from firm-specific standards to those set by industry-wide and international associations. See WTO, *Private Standards and the SPS Agreement: Note by the Secretariat* (G/SPS/GEN/746) 24 January 2007, para. 3.

²²⁰ See WTO, *Private Voluntary Standards and Developing Country: Market Access (preliminary results) Communication from OECD* (G/SPS/GEN/763, 27 February 2007).

²²¹ See Jean-Christophe Bureau, Sebastien Jean, and Alan Matthews, “The Consequences of Agricultural Trade Liberalization for Developing Countries: Distinguishing between Genuine Benefits and False Hopes”, 5(2) *World Trade Review* (2006) p. 244.

²²² See Steinberg and Mazarr, *supra* n. 90, p. 5.

²²³ The Codex review report of 2002 has, in this respect, noted that “greater inclusiveness can arise through more homogeneous groupings of countries focusing on common issues. Such work allows expertise to be brought together by countries which cannot adequately tackle issues on their own. Codex does not presently accept multiple accreditation at meetings (i.e. one delegation speaking for several countries), and we recognize objections to formal multiple accreditation. Informally though, we would encourage procedures whereby groups of members coordinate their positions and communicate these to facilitators and during committee meetings (as is already done by certain groups e.g. the EU and Quads for Codex and is widespread in FAO fora). This would not extend to voting at the Commission.” See *Codex Evaluation*, *supra* n. 188, p. 8, para. 18.

CHAPTER 3: THE REGULATORY FRAMEWORK FOR IGAD LIVESTOCK PRODUCTS: THE REGIONAL AND NATIONAL DIMENSIONS

We have seen in Chapter 1 that IGAD, both as a region and as a collection of individual countries, is highly dependent on the livestock sector for economic growth and for the livelihoods of a large portion of the population. It follows that whatever happens to the prices of such products internationally is bound to affect their chances of progress severely. However, as shown in Chapter 2, the participation of these countries in the international market entirely depends on their ability to produce and trade according to certain national and international rules in whose making IGAD member states hardly have a say. This chapter will survey the regulatory and institutional structure of selected IGAD member states and its implications for regional and extra-regional trade in livestock products. The trade relations of the IGAD region with one potential crucial export market – the EC – will be investigated here. The discussion will focus on the role of sanitary standards on IGAD livestock trade opportunities.

3.1 Regional Integration, Preferences and IGAD Livestock Trade

We have seen in Chapter 2 that there is no IGAD-wide common policy or legal framework for trade in livestock products.²²⁴ We shall see in this section that almost every IGAD member state is party to other regional and/or bilateral agreements that are aimed at closer integration, thus raising issues as to the viability of IGAD as a regional economic integration organization.

3.1.1 Overlapping and Competing Regional Initiatives and Preferential Schemes

3.1.1.1 Regional Initiatives

Different IGAD member states are pursuing a multiplicity of different and sometimes overlapping regional initiatives in which IGAD as a unit plays no role. Indeed, an IGAD-wide policy initiative could be undermined by policies and laws adopted by some of the IGAD member states within the umbrella of other regional trade agreements (RTAs) to which different groupings of IGAD member states belong. Apart from the long-term plan to create a continent-wide African Economic Community (AEC),²²⁵ only one of these RTAs, the COMESA, covers the whole of IGAD (except Somalia) and more, while many others are specific to one or just a few IGAD member states. Examples include the Pan-Arab Free Trade Agreement (PAFTA) in which Sudan is the only IGAD member state that participates in a big regional initiative involving countries in the Middle East and North Africa²²⁶; Kenya is the only IGAD member state that is also a member of the Indian Ocean Rim-Association for Regional Cooperation (IOR-ARC) which brings together about 18 countries in and around the Indian Ocean²²⁷; and

²²⁴ See Chapter 2 *supra*, section 2.4.4.

²²⁵ All IGAD countries are members of the African Economic Community (AEC), which was established by the Abuja Treaty in June 1991. The treaty provides for the creation of an African Common Market in six stages over a 34-year period. The EAC, IGAD and COMESA are all accredited by the AU as regional blocks for this purpose. See WTO (2007) *supra* n. 28.

²²⁶ Also known as Greater Arab Free Trade Area (GAFTA), this was established by the Arab League in 1997 and currently has 17 members: Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Yemen and UAE. Intra-RTA trade liberalization appears to have been progressing well since its establishment and, as of January 2007, all agricultural and industrial products have been subject to duty-free treatment. For more on this, see (WT/REG223/N/1, 20 November 2006).

²²⁷ IOR-ARC member states are Australia; Bangladesh; India; Indonesia; Iran; Kenya; Madagascar; Malaysia; Mauritius; Mozambique; Oman; Singapore; South Africa; Sri Lanka; Tanzania; Thailand;

Djibouti, Eritrea, Somalia and Sudan participate with 19 other countries of north, central and west Africa in the Community of Sahel-Saharan States (CEN-SAD), which aims to establish an economic union.²²⁸ Of all these initiatives, COMESA and the EAC appear to be the most relevant, each in its own way, for the IGAD livestock sector.

COMESA is made up of 19 countries of north, northeast and southern Africa, including six of the seven IGAD countries, i.e. except Somalia.²²⁹ The COMESA Treaty, which entered into force in December 1994, provided for the establishment of a customs union, including a common external tariff, within a transitional period of ten years. COMESA missed its ten year target for the formation a fully-fledged customs union, which it now aims to realize in 2008.²³⁰ COMESA is therefore the principal forum in the region for trade matters and the COMESA Secretariat runs a number of relevant initiatives such as the Livestock Sector Development programme in collaboration with the AU and USAID. However, the fact that nearly all IGAD member states are also COMESA members means that, in principle, IGAD member states can work within COMESA and also go beyond the rest of the COMESA membership towards closer collaboration in some specific policy areas. This is not the case with the East African Community (EAC), for example, making it perhaps the most important and most promising RTA with serious implications for IGAD's future.²³¹

The EAC is a customs union, pursuing closer economic integration among its members, which include Kenya and Uganda from IGAD and Tanzania, Burundi and Rwanda from outside IGAD. The EAC was reported to the WTO under the 1979 Enabling Clause²³² as an agreement "for the progressive establishment of the East African Trade Régime, Customs Union and Common Market" with the long-term ambition of establishing a Monetary Union and ultimately a political federation.²³³ The EAC is making progress towards harmonization of its sanitary requirements on the basis, inter alia, of OIE standards.²³⁴ Indeed, adoption of joint standards is "an important objective for the EAC" and as at September 2005, the EAC had 566 joint standards in place.²³⁵ The Protocol establishing the East African Customs Union entered into force on 1 January 2005,²³⁶ and the EAC (with its three original members) got its first joint trade policy review under the WTO's Trade Policy Review Mechanism (TPRM) in early 2007.

UAE and Yemen. The Association aims to facilitate trade and investment in the region. See <http://www.dfat.gov.au/trade/iorarc/index.html>.

²²⁸ CEN-SAD was established in 1998 with ambitious objectives, including "establishment of a comprehensive economic union" by, inter alia, facilitating the free movement of goods, services, persons and capital. The members of CEN-SAD are Benin, Burkina Faso, Central African Republic, Chad, Côte d'Ivoire, Djibouti, Egypt, Eritrea, Gambia, Ghana, Guinea Bissau, Liberia, Libya, Mali, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, and Tunisia. See <http://www.cen-sad.org>.

²²⁹ The other COMESA members are Burundi, Comoros, Democratic Republic of Congo, Egypt, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Swaziland, Zambia and Zimbabwe. For more information, see http://www.comesa.int/index_html/view.

²³⁰ The COMESA treaty was notified to the WTO as a South-South economic integration agreement under the provisions of the Enabling Clause. See WTO, WT/COMTD/N/3, 29 June 1995.

²³¹ For a comprehensive and up-to-date information on the EAC, see WTO (2007) *supra* n. 28.

²³² GATT Decision of 28 Nov. 1979 on "Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries" (L/4903).

²³³ See WTO Committee on Trade and Development, *East African Community: Notification by the Parties to the Agreement*, WT/COMTD/N/14, 11 October 2000.

²³⁴ In its annual report to the OIE for 2004, Kenya made the following important point: "The harmonisation of standards/measures on terrestrial animals and fish modelled on the OIE standards, guidelines and recommendations to cover the East African Community (EAC) has been completed and is awaiting ratification by the governments of the three EAC partner States. This harmonisation process is aimed at trade facilitation within and outside the EAC." See *World Animal Health 2004*, *supra* n. 147, p. 210.

²³⁵ WTO (2007), *supra* n. 28, p. 24.

²³⁶ See OECD, *African Economic Outlook 2007* (Paris 2007), p. 306.

3.1.1.2 Preferential Schemes

All IGAD member states except Kenya are least-developed countries (LDCs). This means that the WTO-authorised unilateral preferential schemes of developed countries in favour of LDCs, such as the EU's Everything but Arms (EBA) initiative, cannot easily and blindly apply to all IGAD goods as such. This is because WTO law requires that measures for the benefit of LDCs are available exclusively to goods and services originating in such LDCs and cannot be extended to benefit non-LDC developing countries like Kenya. This has potentially adverse implications in terms of the policy options available to IGAD as a unit. For example, IGAD member states may not be able to use IGAD as "the country of origin" for their goods given that goods from six of the seven IGAD member states will often be subject to duty-free treatment while those from Kenya may be subject to a duty as is the case in the EU for livestock products. The WTO does not yet have a harmonized system of rules for the determination of origin and each member country decides on the basis of their own laws.²³⁷ Livestock in particular should normally be among the least controversial in the determination of origin,²³⁸ but animal movements across borders within the IGAD region are quite common, thus making determination of origin potentially difficult. The Cotonou Agreement resolves this problem favourably as it recognizes all ACP countries as a unit in the determination of origin.²³⁹

3.1.2 Intra-IGAD Arrangements

There has always been significant cross-border trade in livestock among the member states of IGAD. According to Peter Little, cross-border trade with Somalia in 2003 "encompasses an estimated 16% of beef consumed in Nairobi."²⁴⁰ It appears that most of this trade may take the form of unofficial or informal cross-border trade, usually dubbed as smuggling by governments that are keen to enforce their customs and other regulations on such trade. Governments naturally want to ensure such trade is properly recorded, pays the necessary taxes and other fees, and does not create the conditions for trade in illicit products, such as drugs and arms.²⁴¹ From a poverty

²³⁷ The WTO Agreement on Rules of Origin only lays down certain general principles that should be observed in the determination of origin during the transition period, i.e. pending the harmonization of (non-preferential) rules of origin across all members, which was scheduled to be concluded within the first three years of the WTO's creation. However, that harmonization agenda has yet to be finalized, the latest schedule having been July 2007. See WTO, *Twelfth Annual Review of the Implementation and Operation of the Agreement on Rules of Origin: Note by the Secretariat*, G/RO/63, 3 November 2006.

²³⁸ There is consensus at the WTO that live animals born and raised in one country and products obtained from them are to be "considered as being wholly obtained in one country". See WTO, *Integrated Negotiation Text for the Harmonization Work Programme – Overall Architecture: Note by the Secretariat*, G/RO/45/Rev.2, 25 June 2002, p. 6.

²³⁹ See *Cotonou Agreement, Protocol 1 concerning the definition of the concept of 'originating products' and methods of administrative cooperation*, Article 3.

²⁴⁰ See Peter Little and Hussein Mahmoud, "Pastoral Risk Management Project Cross-border Cattle Trade Along the Somalia/Kenya and Ethiopia/Kenya Borderlands", Global Livestock CRSP, Research brief 05-03-PARIMA, December 2005, available at <http://glcrsp.ucdavis.edu/publications/parima/05-03-PARIMA.pdf>

²⁴¹ This is however a difficult challenge for many of the countries of the region for several reasons: ill-defined and rather artificial boundaries that sometimes seem to divide members of the same clan; tradition of free movement across borders by herdsmen following their cattle in search of pasture and water, and of course lack of effective control of often long and inhospitable border areas. A good example of this is the nomadic region between eastern and south-eastern Ethiopia, western and north-western Somalia and northern and north-eastern Kenya which has the largest concentration of livestock in the whole IGAD region. See Little, *supra* n. 16.

alleviation perspective, however, cross-border trade, whether formal or otherwise, is almost always beneficial to the poor animal herders and the community at large.²⁴²

3.1.2.1 Bilateral Arrangements: Ethiopia, Kenya and Sudan

It is not surprising therefore that there is quite a number of intra-IGAD arrangements of a bilateral nature. For example, Ethiopia and Sudan have a bilateral agreement²⁴³ which aims to promote trade and broader economic relations between the two countries. The parties to this agreement however agreed to grant only Most-Favoured-Nations (MFN) treatment to each others' goods. Likewise, Ethiopia and Kenya also have a bilateral trade agreement²⁴⁴ with effectively the same objectives as the Ethio-Sudan agreement except that the former has a broader scope. In both cases, the key trade commitment only requires of the parties MFN treatment for each other's trade in goods and services. Given that all three countries are members of COMESA, which naturally aims to deliver preferential terms of access that are more favourable than MFN, it is difficult to find a trade rationale behind such agreements.

Both agreements underline the common objective to discourage informal cross-border trade, but, it is only the agreement between Sudan and Ethiopia that led to further steps towards trade liberalization, half-hearted though it may look, as it was soon supplemented by a border protocol between the two countries (2001, with a revised version signed in December 2005).²⁴⁵ The protocol aims to promote official small-scale cross-border trade by issuing border trade licenses in accordance with a harmonized Border Trade License Directive. This arrangement however sets two forms of quantitative restrictions on the amount of trade that can be transacted in this way. Firstly, a licensed trader under the protocol is allowed to make only a single trip per week, and secondly, the value of each export-import transaction may not exceed about US\$ 250 worth of goods – hardly an encouragement to official cross-border trade in the region. Indeed, as Peter Little pointed out in the context of the Horn of Africa, in cases where cross-border trade restrictions have been eased, “the amount of paper work and time required²⁴⁶ to qualify under new regulations is so cumbersome that most traders do not bother with it.”²⁴⁷

Perhaps more importantly from the trade liberalization perspective, Sudan and Ethiopia also signed the 2002 “Preferential Trade Agreement” in which they agreed to eliminate all import duties on industrial and agricultural products traded between the two countries, applying the COMESA rules of origin for the purpose of determining which products are genuinely from the parties. However, the status of this Agreement and its practical significance remains unclear.

3.1.2.2 The Djibouti Regional Quarantine Facility (RQF)

Although not based on any inter-governmental agreement as such, a potentially significant player in IGAD livestock exports is Djibouti's new Regional Quarantine Facility (RQF). Djibouti has a very small livestock resource base and its role lies in its vital geographical position as a transit port for livestock exports from the neighbouring countries, particularly for landlocked Ethiopia. Building on this geographical

²⁴² For a comprehensive bibliography on this and the positive impact of cross-border trade on the food security of the livestock producers, see Little *supra* n. 16, pp. 20-25.

²⁴³ See *Trade Agreement between the Government of the Republic of Sudan and the Government of the Federal Democratic Republic of Ethiopia*, signed at Khartoum on 6th March 2000, on file with author.

²⁴⁴ See *Trade Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Kenya*, signed at Addis Ababa on 23rd July 1997, on file with author.

²⁴⁵ See *Border Protocol between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Sudan*, signed at Khartoum on 15 December 2005, on file with author.

²⁴⁶ The agreement was signed at Addis Ababa on 25 April 2002 (on file with author).

²⁴⁷ Little *supra* n. 16, pp. 29-30.

advantage, Djibouti established the RQF with support from the USAID and a private investor from Saudi Arabia who signed a concession contract with the Djibouti government.²⁴⁸ This Company, known as Abu Yaser International Est., had its first shipment of livestock from the facility to Saudi Arabia in December 2006, just in time for the Hajji.²⁴⁹

The RQF is a quarantine and certification service provider for livestock exporters from the region but Abu Yaser, its operator, is also a livestock exporter itself. As a service provider, the RQF has two main attractions for other exporters - excellent geographical location and recognition of its certificates by pertinent authorities in the Middle East.²⁵⁰ This second point in particular constitutes a significant positive step forward for the whole livestock industry within the catchment area of Djibouti. The Arabian Peninsula is by far the largest and the most natural export market for IGAD livestock products. Geographical proximity, historical relations and consequent cultural affinities underlie this commercial relationship, and sanitary measures have long been the main obstacle against IGAD livestock exports to this region. The establishment of a state-of-the-art quarantine facility within the IGAD region is thus to be welcomed.

The RQF operates as follows²⁵¹: independent livestock exporters from the region can bring their animals to the RQF only after they have found a buyer in the country of destination, and the animals must be accompanied by necessary documentation, effectively an export-import contract. The RQF then admits the animals for a fee of US\$ 5 per head for small ruminants and US\$ 10 per head for large ruminants. This fee covers everything from segregation of the animals to clinical inspection, treatment, vaccination, tagging all the way to certification and final exit. The entry fee does not however cover the cost of keeping the animals within the Facility until the day of exit; there is a daily charge of US\$ 0.7 per small ruminant and US\$ 1.6 per large ruminant for every passing day after the day of entry into the Facility. The number of days that an animal has to stay within the quarantine facility depends mainly on the requirements set by the importing country, and it is worth pointing out that different countries in the Arabian Peninsula maintain different requirements for the importation of live animals.²⁵² This means that, under normal circumstances, the RQF cost per sheep destined for the Saudi market is about US\$ 26; the same sheep would incur about US\$ 20 if destined for the United Arab Emirates (UAE) market, and US\$ 10 when going to Yemen. Such significant variations are a result of the number of days the animals are required to stay within the Facility under the laws of the importing country.

From the legal perspective, there are two potential issues arising out of the operation of the RQF. Firstly, Abu Yaser International Est., the Saudi company that currently runs the RQF, is not just a quarantine service provider but also a direct player in the exportation of livestock from the IGAD region. As a trader, Abu Yaser competes directly with other livestock traders in the IGAD region; as an operator of the RQF, those other traders become Abu Yaser's clients who invariably need to pass through its

²⁴⁸ It is regrettable that all efforts to obtain a copy of the concession agreement ended in failure.

²⁴⁹ Meeting with the technical director of the RQF, Professor Abubaker Abbas, 7 March 2007, Djibouti.

²⁵⁰ RQF officials stress that the facility has been recognized by all importing countries in the Middle East. Meeting with Dr Abdullah Fadhil Mohammed of the RQF, held on 7 March 2007, Djibouti.

²⁵¹ This section is based on interviews and discussions with RQF officials held in Djibouti on 6-7 March 2007. See also Appendix II.

²⁵² Saudi Arabia apparently has the strictest sanitary requirements, Yemen has the least strict, and the other Middle Eastern countries such as the UAE, Kuwait and Qatar fall somewhere in the middle. For example, RQF officials say that the Saudis require vaccination of animals against Rift Valley Fever regardless of outbreak, while the other countries generally do not require such routine treatment. In terms of the number of days required for animals to stay in the quarantine facility, Saudi Arabia requires a minimum of 30 days, the UAE 21 and Yemen 7 days.

quarantine facility. Secondly, Abu Yaser is also a corporation with “similar investments in Saudi Arabia, Egypt, and Yemen” and “other countries in the world”.²⁵³ Abu Yaser has about 70 slaughter facilities and several factories processing hides and skins as well as bone meal for pet food throughout the Middle East.²⁵⁴ This makes Abu Yaser a direct competitor in the IGAD livestock sector on both the export and import sides. This creates a real conflict of interest between Abu Yaser as a trader that competes with all livestock traders in the region and Abu Yaser as a service provider with monopoly control over an essential facility.²⁵⁵ The legal issue effectively comes down to the potential for abuse of a monopoly position on the part of Abu Yaser. This potential conflict of interest is fully recognized by the technical director of the RQF who nonetheless dismisses the fear by pointing out that the RQF is not just a commercial establishment, but a public-private partnership that operates under the direction of the Djibouti Ministry of Agriculture. The fear, however, is that the interests of Djibouti and Abu Yaser could easily converge around a common goal to capture the livestock trade of the region and work out a revenue-sharing formula between them.

Moreover, there are fears that the use of the Facility may become compulsory for all animals that pass through the port of Djibouti regardless of prior quarantine and certification by, for example, Ethiopian authorities, potentially leading to duplication of tests, doubling of quarantine waiting requirements, feed costs and the like. The only way to overcome this is either for Ethiopia to stop its quarantine services and rely completely on the RQF or for Djibouti to recognize the quarantine certificates of Ethiopia and let its animals pass through its ports without further quarantine requirement within Djibouti. This has already proven to be a politically difficult matter between the two countries. As the main supplier of animals exported via Djibouti, Ethiopia holds that it has a vested interest in the quality, health and safety of the animals it exports; indeed, its reputation and the reputation of its products in the eyes of the importing countries entirely depends on that. As such, Ethiopia will not easily give up such vital powers in favour of a third country. The second option is even less likely for one very simple reason – the RQF is currently run more like a purely private facility that operates mainly on commercial considerations. The solution can be found only through a high-level negotiation between the governments of the two countries as well as the RQF operators. Any resolution of this issue must ensure the continued operation of the RQF which represents a significant step forward for the livestock industry of the region.

3.2 The National Dimension

We have seen earlier that IGAD member states’ large livestock resources have not translated to significant export revenues for these countries. Several factors have been identified to explain the gap between this obvious export potential in the sector and the reality on the ground.²⁵⁶ But, it is clear beyond doubt that inability to meet importers’ requirements with respect to animal health and food safety standards is “a key factor affecting live animal and meat exports” from the region.²⁵⁷ This section

²⁵³ See <http://www.ets-abuyaser.com>.

²⁵⁴ Discussion with Professor Abbas, *supra* n. 249.

²⁵⁵ The potential conflict of interest here could be anything from using the facility to put pressure on competing exporters to sell their animals to the operators of the quarantine facility to possible delays and added costs in processing the clearance of animals from competing traders while within the facility.

²⁵⁶ These include the traditional, i.e. non-commercial, nature of animal husbandry in the region, poor breeding stock, high incidence of animal diseases, poor market and information infrastructure, and so on.

²⁵⁷ See FAO Technical Cooperation Department, “NEPAD – Comprehensive Africa Agriculture Development Programme: Ethiopia: Investment Project Profile ‘Live Animal and Meat Export’ – Preliminary Options Outline”, January 2005, p. 1, available at <ftp://ftp.fao.org/docrep/fao/008/ae669e/ae669e00.pdf>.

aims to provide a survey of the legislative framework for trade in livestock products (to the extent information is available) in three of the IGAD member states - Ethiopia, Kenya and Sudan - with a view to analysing the problem areas that adversely affect the growth of cross-border trade within IGAD and with other countries. It is obviously impossible to describe the entire legal systems in these countries within the limits of this study, and the approach adopted here is to first provide a highlight of the three legal systems focusing on those laws and institutions that have direct relevance for international trade in general, and trade in livestock and livestock products in particular. This will then be followed by analysis of selected legal issues identified or implied as problems during interviews and discussions held with stakeholders in the countries and in the available literature on the subject. The principal sources of information for this purpose are the laws of the countries, which are supplemented by information gathered through interviews and meetings designed to identify the real concerns of people working in the field either as producers, traders or regulators in different ministries within governments. Based on this information, the following six issues have been identified for closer analysis: (1) legal uncertainties, (2) multiple taxation, (3) access to legal information, (4) institutional rivalry among different government departments, (5) inadequate capacity to respond to market failures, and (6) inadequate formal communication channels between government and private sector interest groups.

3.2.1 Ethiopia

3.2.1.1 Highlights of the Ethiopian Legal System

Ethiopia is a federal state comprising nine states, also called regions, largely defined along ethnic lines,²⁵⁸ and two so-called Chartered cities.²⁵⁹ The 1994 Federal Constitution²⁶⁰ apportions legislative power between federal and state authorities. While the federal legislature is empowered to make laws on matters of federal jurisdiction, state legislatures make laws on matters of state jurisdiction. In general, the Constitution specifically and exhaustively lists federal powers while all powers not so listed are, in principle, reserved for states. Powers reserved exclusively for federal jurisdiction include those to formulate and implement the country's overall economic, social and development policies, strategies and plans; to establish and implement national standards and basic policy criteria for public health, education, science and technology; to formulate and execute the country's financial, monetary and foreign investment policies and strategies; to negotiate and ratify international agreements; to levy taxes and collect duties on revenue sources reserved to the Federal Government; and, most importantly for purposes of this paper, to regulate inter-State and foreign commerce.²⁶¹ Powers not given expressly to the Federal Government - alone or concurrently with the states - are reserved exclusively to the States. However, Article 52 of the constitution also provides a long list of matters expressly given to the States, including those to establish a State administration that best advances self-government and a democratic order based on the rule of law; to formulate and execute economic, social and development policies of the State; and

²⁵⁸ The nine member States are: Tigray; Afar; Amhara; Oromia; Somalia; Benshangul/Gumuz; Southern Nations, Nationalities and Peoples; Gambela Peoples; and, Harari People. See Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazeta*, 1st Year, No. 1, 21st August 1995, Article 47(1).

²⁵⁹ These are the capital Addis Ababa (Article 49 of the Federal Constitution and See "Addis Ababa City Government Revised Charter Proclamation No. 311/2003", *Federal Negarit Gazeta* 9th Year, No. 24, 16th January 2003, as amended) and Direedawa (See "The Direedawa Administration Charter Proclamation No. 4162004", *Federal Negarit Gazeta* 10th Year, No.).

²⁶⁰ Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazeta*, 1st Year, No. 1, 21st August 1995, hereafter the Federal Constitution.

²⁶¹ See Article 52 of the Federal Constitution.

again importantly for our purposes here, to administer land and other natural resources ‘in accordance with Federal laws’ as well as levy and collect taxes and duties on revenue sources reserved to the States. From the revenue sources reserved to the Federal Government that are of direct relevance for this paper are the power to levy and collect customs duties, taxes and other charges on all imports and exports and stamp duties.²⁶² Likewise, from the revenue sources reserved for the states, the following are particularly relevant: fees for land usufructuary rights, taxes on the incomes of farmers, and taxes on individual traders within the state.²⁶³ Company profits and dividend payments fall under the concurrent tax jurisdiction of both the federation and the States while the two federal houses of parliament are given the power to allocate taxation powers between the two in cases where a revenue source has not been specifically assigned to either of them by the Constitution.²⁶⁴ We shall see later on that some of these constitutional rules have caused serious problems for the Ethiopian livestock industry.

International agreements concluded by the executive and ratified by the lower House of parliament²⁶⁵ become “an integral part of the law of the land”.²⁶⁶ Ethiopia is already a party to a large number of international treaties of a multilateral, regional and bilateral nature. The Constitution does not however specifically provide for the relative status of ratified international agreements within the hierarchy of laws. The fact that international agreements are addressed under Article 9 of the Constitution, entitled “supremacy of the constitution”, appears to suggest that such international agreements are of the same status as the Constitution itself. However, this is far from settled.

The Prime Minister, and the Council of Ministers that he chairs, are primarily responsible for ensuring the implementation of laws, policies, directives and other decisions adopted by parliament and the Council of Ministers. All matters relating to international trade are within the exclusive jurisdiction of the Federal Government. The Federal Government created the Export Promotion Agency (EPA) in 1998 with the primary object of enhancing the competitiveness of Ethiopian exports on the international market.²⁶⁷ Import-export business is open to any person, natural or juridical, with the required licence to do so. The Ministry of Trade and Industry (MTI), to which the EPA is now accountable, is primarily responsible for the issuance of foreign trade licences and supervision of their activities.²⁶⁸ To that end, a commercial register has been established by law and no one is allowed to engage in a commercial activity unless entered in the commercial register.²⁶⁹ The power to set the exchange rate and allocate foreign currency as well as to regulate banks and insurance and other financial institutions is given to the National Bank of Ethiopia.²⁷⁰

The division of powers between federal and state authorities is also replicated in the structure of the judiciary. In principle, therefore, the Constitution envisages a parallel system of federal and state courts, each with its own respective supreme courts invested with final judicial power, complete with high and first-instance courts.

²⁶² See Article 96 of the Federal Constitution.

²⁶³ See Article 97 of the Federal Constitution.

²⁶⁴ See Articles 98 and 99 of the Federal Constitution.

²⁶⁵ See Article 55 (12) of the Federal Constitution.

²⁶⁶ See Article 9 (4) of the Federal Constitution.

²⁶⁷ See “Ethiopian Export Promotion Agency Establishment Proclamation No. 132/1998”, *Federal Negarit Gazeta* 5th Year, No. 9.

²⁶⁸ See “Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 4/1995”, *Federal Negarit Gazeta* 1st Year, No. 4, art. 14, par. 7.

²⁶⁹ See “Commercial Registration and Business Licensing Proclamation No. 67/1997”, *Federal Negarit Gazeta* 3rd Year, No. 25, art. 4, 5.

²⁷⁰ See “Monetary and Banking Proclamation No. 83/1994”, *Negarit Gazeta*, 53rd Year, No. 43.

Article 78 of the Federal Constitution declares the establishment of “an independent judiciary”. Furthermore, all courts are declared free from any interference or influence of any governmental body or other source. Judges are empowered and required to exercise their functions in full independence directed solely by the law.

The Federal First Instance court is the lowest federal court in the land and has both civil and criminal jurisdictions. It also has both civil and criminal jurisdiction over cases arising in the two chartered cities of Addis Ababa and Direedawa. The Federal High Court has both original and appellate jurisdiction in both civil and criminal matters. The Federal High court also has original criminal jurisdiction on offences against the Constitutional order or the internal security of the state, against foreign states, the law of nations, aviation safety, and trafficking in dangerous drugs.²⁷¹ The Federal Supreme Court, too, has both original and appellate jurisdiction. It has exclusive original jurisdiction in cases where federal government officials (defined to mean members of parliament, people with ministerial or higher rank, Supreme Court judges and others of equivalent ranking) are accused of offences committed in connection with their official duties and for offences involving foreign diplomats. The Supreme Court has appellate jurisdiction over cases decided by the Federal High Court. Finally, it is notable that the Supreme Court also has “power of cassation over any final court decision containing a basic error of law”.²⁷² Accordingly, even if State Supreme Courts have in principle the highest and final judicial powers on matters falling within their jurisdictions, the Federal Supreme Court still retains power that would allow it to review such state cases on cassation, presumably with the power to affirm, modify or reverse such court decisions. The only requirement is that the court can exercise this power only in cases “containing a basic error of law”, whatever that may mean. The Federal Supreme Court also has power to decide cases in which two or more federal and/or state courts claim to have jurisdiction on the same case.

Ethiopian courts do not have the power to rule on issues of constitutionality of laws; this power is reserved to the Upper House.²⁷³ As soon as a constitutional issue is raised in any judicial forum, presumably in the form of a challenge to the constitutionality of any law, it will be referred to the Upper House for decision. To assist the House in its task of constitutional interpretation, it has the power to organize what is called the Council of Constitutional Inquiry, which is also established by the Constitution.²⁷⁴

The Council of Constitutional Inquiry is somewhat odd in both its composition as well as its powers and functions. Article 82.1 of the Constitution, which establishes the Council of Constitutional Inquiry, smacks of a constitutional court for the following reasons: (1) it is placed in chapter nine of the Constitution which is entitled ‘structure and powers of the courts’; (2) the President and Vice-President of the Federal Supreme Court are ex officio members and President and Vice-President of the Constitutional Council; (3) of the other nine members, six are required to be legal experts with proven professional competence and high moral standing while the remaining three are designated by the Upper House from among its members; (4) it has the power to receive cases involving issues of constitutionality of laws and/or acts from courts as well as any interested party; and (5) it has investigatory powers over such disputes and could even remand cases back to courts if it is convinced that no constitutional issue is involved. However, it is not a full-blown constitutional court mainly because the power to interpret the constitution is given exclusively to the Upper House and the role of the Council of Constitutional Inquiry is limited to making non-binding recommendations to this House.²⁷⁵

²⁷¹ See Articles 4 and 12 of the Federal Constitution.

²⁷² See Article 80(3)(a) of the Federal Constitution.

²⁷³ See Articles 83 and 84 of the Federal Constitution.

²⁷⁴ See Article 62(2) of the Federal Constitution.

²⁷⁵ See “Council of Constitutional Inquiry Proclamation No. 250/2001”, *Federal Negarit Gazeta* No. 40, 7th Year, 6th July 2001.

The relevant laws in the area of foreign trade reflect the present Government's liberal and market-oriented economic policy and its commitment to the promotion of free competition in the marketplace. This is reflected in the different incentives available to investors, both foreign as well as domestic, the growing number of bilateral investment agreements being negotiated by the Government with other countries, and its active involvement in several regional economic arrangements (such as IGAD and COMESA). Ethiopia is a member of both Codex and the OIE and the Government is currently in the process of negotiating accession to the WTO.

3.2.1.2 Livestock-Related Laws and Institutions

Ethiopia has a good number of laws providing for the prevention and control of animal diseases, sanitary standards for animals and animal products, specifications for slaughterhouses and other processing facilities, food safety standards, and the like. The 1964 proclamation that set up the Livestock and Meat Board,²⁷⁶ the establishment of a National Veterinary Institute in the same year, the 1970 Meat Inspection Proclamation²⁷⁷ (followed by the 1972 meat inspection regulations), the 1975 Livestock Market and Stockroute regulation,²⁷⁸ the 1998 law establishing the Livestock Marketing Authority (amended in 2000 but repealed in 2004), and the 2002 law on animal disease prevention and control²⁷⁹ are only some of them.²⁸⁰ Many of these laws, such as the 2002 animal disease law, are designed to implement the country's obligations under the OIE. The principal executive organ responsible for the livestock sector today is the Ministry of Agriculture and Rural Development (MoARD). At least since the 1970 Meat Inspection Proclamation, the Ministry of Agriculture (as it then was) has had the power to establish standards and inspect meat to ensure that livestock products exported from, or imported into, Ethiopia are 'wholesome' and fit for human consumption.²⁸¹

After several institutional experiments during the Derg period (1974-91), a Livestock Marketing Authority (LMA) was established in 1998 with the principal mission of promoting the domestic and export marketing of livestock products "through increasing their supply and improved quality."²⁸² Realizing that the sector had no specific body responsible to lead its development, the LMA was given a wide-ranging mandate including: (1) to issue quality control directives on exportable and importable livestock products; (2) to establish and encourage the establishment of staging points for domestic and export trade stock, with the necessary facilities; (3) to establish quarantine stations for use in the export and import of livestock; (4) to provide quarantine services in cooperation with the Ministry of Agriculture; (5) to promote the organization of livestock markets, abattoirs, hides and skins sheds and expansion of their services; (6) to encourage construction of export standard livestock

²⁷⁶ See Proclamation No. 212/1964; (b) Livestock and Meat Board Order No. 34/1964.

²⁷⁷ See Meat Inspection Proclamation No. 274 of 1970, *Negarit Gazeta*, 29th Year, No. 15, 6th April 1970.

²⁷⁸ See Meat Inspection regulations No. 428 of 1972, *Negarit Gazeta*, 32nd Year, No. 14, 13th November 1972.

²⁷⁹ Animal Diseases Prevention and Control Proclamation No. 267/2002, *Federal Negarit Gazeta*, 8th Year No. 14, 31st January 2002. During my last visit to Addis Ababa in August 2006, I have received a copy of draft animal disease prevention and control regulations that had been submitted to the Council of Ministers for adoption.

²⁸⁰ There are many others, too, but getting hold of them all is next to impossible. This is a problem shared by virtually all IGAD countries with the possible exception of Kenya.

²⁸¹ See Article 4 of the Meat Inspection Proclamation No. 274 of 1970, *Negarit Gazeta*, 29th Year, No. 15, 6th April 1970.

²⁸² This was originally called the "Animal, Animal Products and By-Products Marketing Development Authority" (see Proclamation No. 117/1998) and renamed in 2000 as The Livestock Marketing Authority. See the "Animal, Animal products, and By-products Marketing Development Authority Establishment (Amendment) Proclamation No. 198/2000."

product processing plants in accordance with international requirements; (7) to issue certificates of competence; (8) to set criteria that must be fulfilled by domestic, import and export traders in livestock products; (9) to promote and expand livestock export markets; (10) to collect, analyze and disseminate information on the current demands and international animal, animal products and by-products market situation to producers, domestic and foreign consumers and traders; and (11) to give technical support and advice to the Regions.

The LMA was put under the Ministry of Trade and Industry in 2001,²⁸³ and barely three years later, it was abolished altogether and its powers transferred to the newly restructured Ministry of Agriculture and Rural Development.²⁸⁴ This is a ministry with extensive powers and responsibilities to, inter alia: (1) promote rapid and sustainable agricultural and rural development; (2) encourage and assist in the provision of agricultural extension services and credit facilities to peasants and pastoralists; (3) conduct quarantine controls on plants, seeds, animals and animal products brought into the country or destined for exportation; (4) take the necessary measures to prevent the outbreak of animal and plant diseases and migratory pests; (5) closely monitor international markets and provide producers with comprehensive, up-to-date and accurate information to enable them identify those agricultural products which they can produce at competitive prices and quality; (6) cooperate with the Quality and Standard Authority of Ethiopia in standardization of agricultural products; (7) set criteria to be fulfilled by traders engaged in the production, supply and distribution of agricultural inputs and the processing, grading and export of agricultural products; and (8) issue import and export permit for agricultural inputs.

The other important player in the livestock sector, particularly as related to food products containing livestock products, is the Ministry of Health. Article 22 of the proclamation that defines the powers and responsibilities of the executive gives this ministry powers to, inter alia, devise and follow up the implementation of ways and means of preventing and eradicating communicable diseases, undertake the necessary quarantine controls to protect public health, and conduct studies with a view to determining the nutritional value of foods.²⁸⁵ There is also the Drug Administration and Control Authority that was established in 1999 with wide-ranging powers to set and enforce drug-related standards relating to their quality, safety and efficacy as well as setting the standards of competence for organizations to be involved in drug trade.²⁸⁶ Article 8 of the Public Health Proclamation requires, inter alia, that no unhygienic, contaminated, unwholesome or mislabelled food shall be prepared, imported, distributed, or made available to consumers and that all food intended for human consumption “shall meet the standards of food quality”.²⁸⁷

3.2.2 Kenya

3.2.2.1 Highlights of the Kenyan Legal System

Kenya enjoys the oldest, most stable and best-developed constitutional system in the IGAD region. Kenya has known only one constitution since its birth as an independent nation in December 1963, which has since remained the supreme law of the land, and

²⁸³ See Article 5 of “Reorganization of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 256/2001”.

²⁸⁴ See “Reorganization of the Executive Organs of the Federal Democratic Republic of Ethiopia (Amendment) Proclamation No. 380/2004, *Federal Negarit Gazeta*, 10th Year No. 15, 13 January 2004.

²⁸⁵ See “Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 4/1995”, *Federal Negarit Gazeta* 1st Year, No. 4.

²⁸⁶ See Drug Administration and Control Proclamation No.176/1999, *Federal Negarit Gazeta*, 5th Year, No. 60, 29 June 1999.

²⁸⁷ See “Public Health Proclamation No. 200/2000”, *Federal Negarit Gazeta*, 6th Year, No. 28, 9th March 2000.

any law inconsistent with it is deemed to be void.²⁸⁸ This constitution has certainly undergone several amendments, in some cases drastic, but all that was done without losing the continuity and stability that characterize a mature legal system.²⁸⁹

Kenya is a unitary state made up of eight provinces,²⁹⁰ with a unicameral legislature²⁹¹ and a powerful president.²⁹² This has not always been the case, though. The original version of the constitution established a bicameral parliament (a Senate and a House of Representatives), a prime minister-led cabinet, and regional assemblies with significant powers.²⁹³ All these three key features of the original constitution were changed quickly after independence as the Upper House of Parliament was abolished, the post of Prime Minister replaced by a president who became both the head of state and government, and the regional assemblies that had given Kenya a federal state structure reduced to mere provinces. Most of these changes happened in the very first two years of independence.²⁹⁴

It is notable for our purposes here that agriculture was one of the sectors put within the jurisdiction of the regions either exclusively or in concurrence with the centre under the 1963 constitution.²⁹⁵ But, as Okoth-Ogendo wrote in 1972, already in the first amendment of the constitution in 1964, “[n]early all the non-entrenched regional provisions, and in particular Schedule 2 which dealt largely with areas of concurrent central and regional powers over some agricultural and veterinary matters ... were deleted.”²⁹⁶ The wisdom of this move to centralize power could always be debated, but this development has had some positive implications for the livestock sector. We shall see later on that multiple taxation by regional and central authorities and lack of coordination between these two levels of government in the fight against animal diseases have been identified by many as two of the most important regulatory obstacles to livestock trade in the IGAD region. Kenya’s unitary structure and centralized veterinary and fiscal systems should, at least in theory, mean a more favourable regulatory climate for livestock trade than the as yet undeveloped federal systems of neighbouring Ethiopia and Sudan. That does not of course mean that animal movements within Kenya are necessarily free; quarantine and animal disease control requirements often make this difficult in practice. It only means that, at least de

²⁸⁸ See Section 3 of the 1963 Constitution of the Republic of Kenya, as amended. The text of the Constitution as well as other laws is available at *Kenya Law Reports*, <http://www.kenyalaw.org/eKLR/index.php>.

²⁸⁹ The Kenyan electorate rejected a proposed new constitution in a referendum held in November 2005.

²⁹⁰ These are the Nairobi Area plus the seven provinces of Central, Coast, Eastern, North East, Nyanza, Rift Valley and Western. See The Districts and Provinces Act of 1992, Chapter 5.

²⁹¹ This is the National Assembly and has 224 members; 210 are elected directly by the people, 12 are “nominated members” appointed by the president (the nomination being made by the parliamentary parties according to their share of seats in the National Assembly and the President presents this for approval by the Assembly; see section 33 of the Constitution of Kenya) and two are ex-officio members: the attorney general who is a non-voting member appointed by the president and for whom he is the principal legal advisor, and the speaker of parliament appointed by parliament as a voting member who may not necessarily be an already elected member of parliament.

²⁹² The President and the National Assembly constitute the parliament, the organ that has all legislative power of the Republic. See section 30 of the Constitution of Kenya.

²⁹³ This changed almost immediately as the first set of amendments to the Constitution entered into force when Kenya was celebrating its first anniversary of independence in December 1964, at which time Kenya became a Republic. For the early history of Kenya’s constitutional developments, see Chanan Singh, “The Republican Constitution of Kenya: Historical Background and Analysis” 14(3) *International and Comparative Law Quarterly*, (July 1965), pp. 878-949.

²⁹⁴ See Okoth-Ogendo, “The Politics of Constitutional Change in Kenya since Independence, 1963-1969”, *African Affairs*, 9-34 (1972) pp. 19-20.

²⁹⁵ See *Id.* p. 15.

²⁹⁶ See *Id.*

jure, there is a country-wide system that operates to tackle the problems of the sector and any taxes levied by local authorities are easier to challenge as illegal in a unitary system than in a federal system where the division of power between central and regional authorities may not always be clear.²⁹⁷

Members of the judiciary are appointed by the President. Courts have the power to interpret the constitution, the High Court being the 'superior court of record' with 'unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.'²⁹⁸ A Court of Appeal, also described by the constitution as 'a superior court of record', has jurisdiction to hear appeals from the High Court.²⁹⁹ Subordinate courts also have power to rule on constitutional matters but they have the right to refer issues of constitutional interpretation to the High Court. This right ceases to be an option as soon as a party to proceedings requests that a referral be made to the High Court, which the subordinate courts are obliged to do.³⁰⁰ Indeed, Kenyan courts enjoy the power of judicial review of administrative action, thereby effectively "monitor[ing] the exercise of governmental power".³⁰¹

Kenya follows a market-oriented economic policy pursuing strategies of export diversification and enhancement through multilateral, bilateral as well as regional liberalization efforts.³⁰² The President has power to negotiate, sign and ratify international treaties. However, international treaties signed and ratified by the executive can have legal effect internally only after they have been incorporated into municipal law by an act of parliament.³⁰³ This contrasts with the situation in, for example, Djibouti, where the 1992 Constitution "embodies the principle of the primacy of international legal instruments signed and ratified by Djibouti, ... over internal legislation."³⁰⁴ Kenya is a member of both Codex and the OIE and a founding member and an active participant of the WTO.

3.2.2.2 Livestock-Related Laws and Institutions

Kenya has a relatively well-developed regulatory framework governing the livestock sector.³⁰⁵ The key laws relevant to the livestock industry include the Animal Diseases Act,³⁰⁶ the Kenya Meat Commission Act,³⁰⁷ the Dairy Industry Act,³⁰⁸ the Hides and Skins Act³⁰⁹, the Prevention of Cruelty to Animals Act,³¹⁰ the Meat Control Act³¹¹, the

²⁹⁷ In reality, too, Kenya seems to suffer only a milder form of the taxation problem. Still Kenyan traders "complain of taxes they have to pay at source and en-route to the terminal markets" and the many roadblocks and the "extras" that need to be paid to get past them. Aklilu found "about 18 roadblocks between Moyale and Nairobi" alone. See Aklilu (2002, Vol. I), *supra* n. 20, p. 7.

²⁹⁸ See Section 60(1) of the Kenyan Constitution.

²⁹⁹ See Section 64 of the Kenyan Constitution.

³⁰⁰ See Section 67 of the Kenyan Constitution.

³⁰¹ See Victor Mosoti, "Reforming the Laws on Public Procurement in the Developing World: The Example of Kenya", 54(3) *International and Comparative Law Quarterly* (July 2005), p. 624.

³⁰² For a general but critical look at Kenya's trade strategies, see James Gathii, "A Critical Appraisal of the NEPAD Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centred Development", 13 *Transnational Law and Contemporary Problems*, pp. 179-210.

³⁰³ See Ojwang, J. B., and Luis Franceschi, "Constitutional Regulation of the Foreign Affairs Power in Kenya: A Comparative Assessment", 46(1) *Journal of African Law* (2002), p. 57.

³⁰⁴ See WTO, *Trade Policy Review Report by the Secretariat: Djibouti Revision*, WT/TPR/S/159/Rev.1 (13 April 2006), para. 6.

³⁰⁵ See also Kenya Export Processing Zones Authority, *Meat production in Kenya* (Nairobi, 2005).

³⁰⁶ See the Animal Diseases Act, Chapter 364 of the Kenyan laws.

³⁰⁷ See the Kenya Meat Commission Act, Chapter 363 of the Kenyan laws.

³⁰⁸ See the Dairy Industry Act, Chapter 336 of the Kenyan laws.

³⁰⁹ See the Hide, Skin and Leather Trade Act, Chapter 359 of the Kenyan laws.

Cattle Cleansing Act,³¹² the Branding of Stock Act³¹³ and the Veterinary Surgeons Act.³¹⁴ In the words of the WTO Secretariat, Kenya is “the only EAC country with capacity to enforce” SPS standards,³¹⁵ a statement that should easily hold true at the IGAD level as well.

The Ministry of Trade and Industry (MTI) is responsible for the formulation, implementation, and coordination of Kenya’s trade policies. The Kenya Bureau of Standards (KEBS) is a statutory body under the MTI with a mandate that includes preparation and dissemination of standards, certification of industrial products and serves as Kenya’s notification authority and national enquiry point under the TBT Agreement. As the 2007 WTO Trade Policy Review report noted, since 1 January 2005, ‘some of Kenya’s trade policy instruments, customs tariffs in particular, have been set at the East African Community (EAC) level.’³¹⁶

The Ministry of Livestock and Fisheries is the principal institution responsible for the livestock sector in Kenya. Just like in Ethiopia today, the livestock sector was part of the Ministry of Agriculture until 1980, when a separate ministry of livestock was first created. This did not last, however, and it was only after several “splits and mergers” between these two ministries that Kenya finally established the present Ministry of Livestock and Fisheries in 2003.³¹⁷ The Ministry has four departments (Veterinary Services, Livestock Production, Fisheries Development, Administration) and three so-called parastatals (the Kenya Dairy Board, the Kenya Meat Commission, and the Kenya Marine and Fisheries Research Institute). The services provided by the Ministry include advisory/extension services in livestock and fisheries production, marketing and health; regulatory services aimed at quality assurance in livestock and fisheries inputs and products; surveillance, reporting and control of diseases and pests; animal movement control and quarantines; issuance of sanitary certificates for livestock, fish and their products; inspection and certification of abattoirs and fish processing establishments; inspection and certification of veterinary inputs; food safety and control of zoonoses; facilitation of international trade through linkages with the OIE, Codex, FAO, WHO, AU-IBAR and others, and provision of licences.³¹⁸ These tasks are distributed among the four departments and a key department for our purposes is the Veterinary Services Department which is effectively the domestic counterpart to what the OIE aims to achieve at the international level. Under the Animal Diseases Act, the Director of Veterinary Services (DVS) has the power to, inter alia, declare areas infected with diseases and take remedial measures including isolation of the regions, disinfections and restrictions on the movement of animals, prohibit the importation and exportation of animals, and set quarantine procedures and certification criteria. The DVS is Kenya’s national enquiry point under the WTO SPS Agreement for animal health.³¹⁹

Another key player particularly in the exportation of Kenyan livestock products until the early 1980s was the Kenya Meat Commission (KMC). The KMC was established in

³¹⁰ See the Prevention of Cruelty to Animals Act, Chapter 360 of the Kenyan laws.

³¹¹ See the Meat Control Act, Chapter 356 of the Kenyan laws.

³¹² See the Cattle Cleansing Act, Chapter 358 of the Kenyan laws.

³¹³ See the Branding of Stock Act, Chapter 357 of the Kenyan laws.

³¹⁴ See the Veterinary Surgeons Act, Chapter 366 of the Kenyan laws.

³¹⁵ See WTO (2007), *supra* n. 28, p. viii.

³¹⁶ See *Id.* p. A1-47.

³¹⁷ See *Draft Sessional Paper*, *supra* n. 33, p. 8.

³¹⁸ The service charter of the Ministry of Livestock and Fisheries, 2003, available at http://www.livestock.go.ke/images/stories/service_charter_may31.pdf.

³¹⁹ The Director of Medical Services is the national enquiry point for human health for Codex purposes. See WTO (2007), *supra* n. 28, p. A1-58.

1950 by the Kenya Meat Commission Act³²⁰ with near-monopoly powers. According to Section 8(1) of the KMC Act, only the Commission may “erect, establish or operate any abattoir, meat works, cold storage concern or refrigerating works for the purpose of slaughtering cattle and small stock, processing by-products thereof and chilling, freezing, canning or storing beef, mutton or other meat foods (excluding poultry), either for export or for consumption within Kenya”. Other individuals or firms may engage in such business only “under and in accordance with a licence which may be granted by the Minister, after consultation with the Commission, subject to such terms and conditions as the Minister may impose.” This already makes the KMC an important operator in the sector with significant regulatory powers over possible competitors. Most importantly, however, section 8(1)(b) goes further and stipulates that no person, other than the Commission may “export or supply to ships in the port of Mombasa fresh, chilled, frozen or canned beef, mutton or other meat foods (excluding poultry) except under and in accordance with a licence granted by the Commission subject to such terms and conditions as the Commission may impose.” Needless to say, when it comes to exportation, the KMC is not just to be consulted by the Minister prior to issuance of licences to others; the KMC is itself the licensing authority.³²¹ The KMC was successful for quite a long time but gradually corruption and operational incompetence got in the way. The KMC stopped operations in 1986,³²² was closed in 1987, reopened in 1989, closed down again in 1992 and put into official receivership in 1998.³²³ While the collapse of the KMC may have been a blessing for private companies, which “proliferated in the major urban centers to supply meat to the local market”, Kenya’s livestock and livestock product exports also went down with the KMC itself. The KMC was reopened on 26 June 2006 by president Kibaki who not only “issued a stern warning to those who will misappropriate the parastatal’s funds” but also promised his Government “will also pursue those who mismanaged the parastatal leading to its collapse 15 years ago to ensure they pay back what they owe Kenyans.”³²⁴

The Kenya Livestock Marketing Council (KLMC), which represents the interests of the private sector, is another important player in the livestock industry. KLMC is a membership organization and its key objective is to champion the interests of its members before relevant governmental bodies and to promote livestock marketing mainly internationally.³²⁵ However, KLMC officials stress that the interests of the poor pastoralist are a key element of their mission and their organizational structure already covers nearly all pastoralist districts in the country.³²⁶

3.2.3 Sudan

3.2.3.1 Highlights of the Sudanese Legal System

The Sudanese legal system is very much in a state of flux at this particular moment in the country’s history. When the North-South conflict that had gripped the country for decades came to an end with the conclusion of the 2005 Comprehensive Peace Agreement (CPA) between the Government of Sudan and the Sudan People’s

³²⁰ See Kenya Meat Commission Act, Chapter 363 of the Laws of Kenya.

³²¹ The chairman of the commission is appointed directly by the president of the country while its members include other high-profile figures from government, representatives of livestock producers and recognized independent experts. See section 3(1) of the Kenya Meat Commission Act.

³²² See *Draft Sessional Paper*, *supra* n. 33, p. 2.

³²³ See *Draft Sessional Paper*, *supra* n. 33, p. 51, and See Munyao speech, *supra* n. 12.

³²⁴ See Kibaki speech, *supra* n. 30.

³²⁵ For information on the KLMC, see <http://www.k-lmc.org/index.htm>.

³²⁶ Discussion with Mr. Abass Mohammed, CEO, and Mr. Qalicha Wario, Marketing officer, held in Nairobi 6 September 2006. The two officials confirmed that they have good access to the relevant authorities within the Government, including ministers.

Liberation Movement/Army, its implications for the Sudanese legal system were immense both for the immediate short term and possibly for the indefinite future. The CPA effectively determined the content of the Interim National Constitution (INC) of the Republic of the Sudan 2005,³²⁷ which is currently the supreme law of the land throughout the country for “the Interim Period”.³²⁸ According to INC Article 226(4), the INC remains the supreme law of the land for a six-year interim period that commenced on 9 July 2005 and will conclude with the referendum on self-determination promised by the constitution to the people of Southern Sudan on whether to sustain the interim arrangement set up by the INC or to secede altogether and form their own independent state.³²⁹ The Government of National Unity established by the INC is charged with the responsibility of implementing the CPA. This section is thus largely based on the INC and other laws with particular relevance to the livestock sector focusing on the key regulatory problems identified during the field research and by the work of other researchers. Most of these problems revolve around the complex division of powers contained in or contemplated by the INC between the different levels of government.

Article 24 of the INC sets up four levels of government – national, Southern Sudan, state, and local – the first three with their own legislative, executive and judicial organs. The easiest way to describe Sudan is to say that it is a federal state comprising 25 states, but this does not say where the Southern Sudan government fits in, and the nature of the relationship between the national government and the state governments varies depending on whether a state is in Southern Sudan or Northern Sudan.³³⁰ Southern Sudan is a constitutional entity with ten states under it,³³¹ while Northern Sudan is merely a geographical short hand to refer to all states of the Sudan outside the Southern Sudan region.³³² Article 26(1) of the INC provides that the national government does not have direct links with the state governments within Southern Sudan, for which it must go through the government of Southern Sudan. Another crucial feature of the INC is the resource and revenue sharing mechanism that it has put in place between these levels of government.

The constitutional set up is truly complex³³³ but, our main interest here is in the division of legislative and executive powers between the different levels of government as they affect the livestock sector from a trade-regulation perspective. At

³²⁷ The INC entered into force on 5 July 2005. The Peace Agreement has been explicitly incorporated into the INC as follows: “The Comprehensive Peace Agreement is deemed to have been duly incorporated in this Constitution; any provisions of the Comprehensive Peace Agreement which are not expressly incorporated herein shall be considered as part of this Constitution.” INC Article 225. Murray and Maywald noted: “The CPA has had a significant effect on the substantive content of the national, Southern Sudan, and state constitutions. Indeed, when the Protocols on Power Sharing, Wealth Sharing, and Security Arrangements are read together, it is apparent that little of political significance was left to be settled in the INC and the subnational constitutions.” Christina Murray and Catherine Maywald, “Subnational Constitution-Making in Southern Sudan”, 37 *Rutgers Law Journal* (2005-2006) p. 1212.

³²⁸ See INC Preamble, last para.

³²⁹ See Article 222 of the Interim National Constitution of the Republic of Sudan 2005.

³³⁰ Note however that the word “federal” does not appear anywhere in the INC.

³³¹ The ten states within Southern Sudan are Central Equatoria, East Equatoria, West Equatoria, North Bahr el Ghazal, West Bahr el Ghazal, Lakes, Warab, Jonglei, Unity, and Upper Nile. These states occupy the former three Southern Provinces of Bahr el Ghazal, Equatoria and Upper Nile in their boundaries as they stood on January 1, 1956 (see Article 1 of the Interim Constitution of Southern Sudan, which entered into force on 5 December 2005).

³³² The 15 states in Northern Sudan are Gezira, Gadaref, Jonglei, Kassala, Khartoum, North Darfur, North Kordofan, Northern, Red Sea, River Nile, Sennar, South Darfur, South Kordofan, West Darfur, and White Nile.

³³³ Not much has yet been published in academic journals on Sudan’s interim national constitution. For useful preliminary reflections on the INC, and particularly on the development of state constitutions within Southern Sudan, see Murray and Maywald, *supra* n. 327.

the national level, Sudan has a bi-cameral legislature composed of the National Assembly and the Council of States³³⁴ while the Southern Sudan government and the states have unicameral parliaments.³³⁵ Members of the National Assembly are elected directly by the people while members of the Council of States are elected by the state legislatures and effectively come as representatives of their respective states.³³⁶ While some of their legislative functions require them to sit jointly, each House is also an important player in its own right. The two Houses together, i.e. the National Legislature, are required to represent the will of the people and to “foster national unity”.³³⁷

Among the powers of the National Legislature are amendment of the interim constitution, authorization of the annual allocation of resources and revenues proposed by the president, and promulgation of the Southern Sudan Referendum Act. The National Assembly has power to make any laws on matters that fall within the jurisdiction of the national government including ratification of international treaties, conventions and agreements, while the Council of States is competent to make laws on matters pertaining to the decentralized system and the interest of states as well as such powers as approval of appointment of justices of the constitutional court. In cases where bills considered by the National Assembly are likely to affect the interests of states, the constitution requires that they be first referred to an Inter-Chamber Committee that is composed of members of both Houses of the National Legislature.³³⁸ The term of each chamber of the National Legislature is five years.³³⁹

The INC contains three different schedules (A through C) that define legislative and executive powers reserved exclusively to the national government, the Southern Sudan government and state governments, respectively. This is then followed by three other schedules (D through F) containing respectively a list of powers that fall within the concurrent jurisdictions of all three levels of government, an agreed mechanism for dealing with residual powers, and a conflict resolution mechanism in case of contradiction between the laws of different levels of government regarding matters of concurrent jurisdiction. Each of the four schedules (A through D) contains such detailed lists of powers and function areas that administrative confusion and legal uncertainty at the implementation stage appears simply inevitable.

Schedule (A) contains a list of 38 areas reserved exclusively for the national government, and the following are mentioned only as examples relevant for international trade in general and trade in livestock products in particular: foreign affairs and international representation; currency, coinage and exchange control; maritime shipment; national lands and national natural resources; customs, excise and export duties; signing of international treaties; international and inter-state transport, including roads, airports, waterways, harbours and railways; national economic policy and planning. Likewise, the 22 specific areas listed in Schedule (B) as reserved exclusively for the Southern Sudan government include the establishment of rules and standards on intra-state commerce; environment; agriculture; commercial regulation; control of animal diseases and veterinary services; consumer protection; and taxation

³³⁴ See Article 83 of the Interim National Constitution of the Republic of Sudan 2005.

³³⁵ See for example Article 57 of the Southern Sudan Constitution on the establishment of the Southern Sudan Legislative Assembly.

³³⁶ Each state is represented by two people in the Council of States while the number of members in the National Assembly depends on the population size of each state. See INC Articles 84 and 85. However, until an election takes place under the INC, the president has been given power to appoint 450 people as members of the National Assembly which he is required to do in consultation with the First Vice President (who must be a Southerner) and in accordance with a seventy-thirty ratio for the North and the South respectively. See Article 117 of the INC.

³³⁷ See INC Article 91(1).

³³⁸ See INC Article 91(3)-(5).

³³⁹ See INC Article 90.

and raising of revenue from within Southern Sudan. At the state level, too, the following are only a few of the many areas Schedule (C) reserves for their exclusive jurisdiction: regulation of state land and state natural resources; regulation of businesses and trade licenses; the development, conservation and management of state natural resources; making laws in relation to agriculture within the state; and direct and indirect taxation within the state in order to raise revenue for the state. Finally, the list in Schedule (D) on concurrent powers for all three levels of government includes regulation of trade, commerce, industry and industrial development; and the initiation, negotiation and conclusion of international and regional agreements on, inter alia, trade and investment with foreign governments; pastures; veterinary services and control of animal and livestock diseases; human and animal drug quality control; and regulation of land tenure, usage and exercise of rights in land. The few provisions cited here suffice to show that such issues as taxation and revenue generation, regulation of commerce and management of land and other natural resources appear under each list, thereby exposing economic operators to the risk of over-regulation and double or even multiple taxation. We shall see below that these are not mere theoretical possibilities, but actual problems that are affecting producers and traders in the livestock product chain.

The national executive organ is made up of the presidency (i.e. the president and two vice presidents) and the national council of ministers. The president is both the head of state and head of government. The president and the two vice presidents are also members of the council of ministers - its other members being appointed by the president in consultation with the vice presidents.

The president has significant legislative powers; indeed, INC Article 108(1) stipulates that all bills normally require his assent before they become law. The president must make his position clear, and give his reasons in case he does not assent, within thirty days of the passage of the bill as otherwise the bill "shall be deemed to have been so signed." This is a one off opportunity for the president to stop a bill from becoming a law. Once the president has given his reasons for withholding assent, the bill goes back to the National Legislature for reconsideration and, if the latter again passes the bill by a two-thirds majority of all the members and representatives of the two Chambers, the bill becomes law without requiring the assent of the President.³⁴⁰ Finally, the president also has power to issue provisional orders with the force of law on matters of particular urgency that happen at a time when the National Legislature is not in session.³⁴¹ This power does not extend to "matters affecting the Comprehensive Peace Agreement, the Bill of Rights, the decentralized system of government, general elections, annual allocation of resources and financial revenues, penal legislations, international conventions or agreements altering the borders of the State."³⁴² The power to ratify international treaties normally belongs to the National Legislature but it can delegate this power to the president for the time when it is not in session. Conventions ratified by the president during such period "shall not be subject to subsequent ratification by the National Assembly" although they are required to be deposited before it as soon as it is convened.³⁴³ Sudan is a member of the OIE and Codex and it has been negotiating its accession to the WTO since 1994 and currently stands at the stage of bilateral market access negotiations on the basis of revised offers on goods and services.³⁴⁴

³⁴⁰ An interesting legal issue would be whether this sequential logic is affected if the National Legislature, after considering the reasons given by the president, introduces changes to the original bill before passing it a second time.

³⁴¹ See Article 109 of the Interim National Constitution of the Republic of Sudan 2005.

³⁴² See Article 109(2) of the Interim National Constitution of the Republic of Sudan 2005.

³⁴³ See Article 109(4) of the Interim National Constitution of the Republic of Sudan 2005.

³⁴⁴ See WTO, http://www.wto.org/english/thewto_e/acc_e/a1_soudan_e.htm. See also Victor Mosoti, "The Legal Implications of Sudan's Accession to the World Trade Organization", 103 *African Affairs* (2004), pp. 269-282.

Sudan's judicial system is also nearly as complicated as the country's overall state structure. The INC has created a Constitutional Court³⁴⁵ that is separate from the national judiciary. The mandate of the Constitutional Court is limited to purely constitutional issues and some criminal jurisdiction on high state officials such as the president of the republic. It is a powerful organ that stands independent of both the Legislature and the Executive, and with the final say on the interpretation of the national, Southern Sudan and all state constitutions.³⁴⁶ The Constitutional Court is made up of nine justices, one of them its president, appointed by the country's president subject to approval by the Council of States. The Constitutional Court also has power to decide on the constitutionality of laws and to adjudicate on constitutional disputes between different levels and organs of government in the country.³⁴⁷

The National Judiciary, on the other hand, is the body vested with judicial authority and made up of the National Supreme Court, the National Courts of Appeal and Other National Courts. The national judiciary is headed by a Chief Justice who also serves as the president of the National Supreme Court. Apart from constitutional matters, the National Supreme Court is effectively the highest court on the land, described by the Constitution as "a court of cassation and review in respect of any criminal, civil and administrative matters arising out of, or under national laws, or personal matters".³⁴⁸ The president of the country appoints all judges and justices upon the recommendation of the National Judicial Service Commission which is headed by the Chief Justice. The INC also contemplates a parallel judicial system for Southern Sudan, with power to appoint the justices and judges given to the President of Southern Sudan.³⁴⁹

3.2.3.2 Livestock-Related Laws and Institutions

Livestock production and trade in Sudan is an old and traditional business that currently accounts for 20% of the national GDP and 30% of the non-oil export revenue.³⁵⁰ The first livestock laws were issued in 1902 by the British colonial administration relating to animal diseases while the second relevant law was issued in 1913 relating to livestock exports. Both laws remained unchanged for nearly a century, the 1902 law having been amended and updated by the Animal Diseases Act 2001, and the 1913 law replaced by the Hygienic Quarantine on Export of Meat and Live Animals Act 2004.³⁵¹ This latter law on quarantine and export of livestock requires, inter alia, an ear-tagging system with different colours used for cattle originating from different parts of the country, allowing them to be traced back to particular regions although not to particular ranches or farms.³⁵² There are also several other laws relevant to the sector applicable today, including the Animal Disease-Free Zone Act 1973, the Meat Inspection and Hygiene Act of 1974, and the Protection of Animal Genetic Resources Act 2004.³⁵³ There is also a presidential

³⁴⁵ See Part Five, Chapter I, of the INC.

³⁴⁶ Note however that the Supreme Court of Southern Sudan has power to "adjudicate on the constitutionality of laws and set aside or strike down laws or provisions of laws that contradict the Interim Constitution of Southern Sudan or the constitutions of Southern Sudan states." See INC Article 174(c).

³⁴⁷ See INC Article 122(1).

³⁴⁸ See INC Article 125.

³⁴⁹ See INC Articles 132 and 172-175.

³⁵⁰ Discussion with Dr Hassan Mohamed Nur, *supra* n. 7.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ Note that these are free translations from the Arabic original text, for which I am grateful to Dr Mahmoud Firoozmand here at CEPMLP, University of Dundee.

decree that prohibits the imposition of taxes on the movement of animals across state boundaries within Sudan but officials stress that, in practice, states impose taxes on such animals arguing that the animals have used up rare pastures and water and/or have 'polluted' the environment while passing through that land.³⁵⁴

The Ministry of Animal Resources and Fisheries (MARF) is the federal executive organ primarily responsible for the livestock sector. National priorities in the field of livestock were summarized in the Memorandum of Foreign Trade Regime submitted by the government in 1999 as including control and eradication of livestock diseases, revitalisation of veterinary services, privatisation of veterinary services, expansion of disease-free zones and establishment of export facilities like quarantines and slaughterhouses in the ports and frontier points.³⁵⁵ Needless to say, these same priorities remain at the top of the government agenda today.

Sudan enjoys a fairly well-established and qualified veterinary service.³⁵⁶ All veterinary activities are carried out under the auspices of MARF, which has several departments within it, the two most relevant for us being the department of Animal Health and Epizootic Diseases Control, and the department of Quarantines and Meat Hygiene. The Meat Hygiene Institute under the latter department, for example, inspects slaughterhouses and meat intended for both local and export markets.³⁵⁷ Just like in Ethiopia, the Meat Hygiene department assigns vets to each export slaughterhouse or meat processing plant "to undertake both pre-mortem and post-mortem examinations".³⁵⁸ The Ministry of Health is responsible for, inter alia, establishment and implementation of sanitary measures for foods and drugs. Sudan reported as early as 1999 that its standards for food products, additives, veterinary drugs and pesticides are "identical to codex".³⁵⁹

The Ministry of Foreign Trade then takes care of national trade policy, including 'representation of the Sudan in regional and international trade organisations'. The Ministry of Foreign Trade does not require a license as a condition for a person to engage in export trade. Any person can export products from the Sudan as long as they produce a contract for export (i.e. with an importer on the other side) together with an import permit from the destination country and they go to the Ministry for signature only for statistical purposes.

Finally, Sudan had a Livestock and Meat Marketing Corporation (LMMC), which was created in 1974 and started operation in 1976. This was a largely service-oriented corporation that was tasked with building information systems and creating new markets. However, this was abolished in 1992 by the government for cost reasons. The gap that was created as a result of its abolition has now been filled by the creation of the Animal Resources Service Company (ARSC) which is 20% government-owned and 80% private.³⁶⁰ The ARSC's main task is to organize open and transparent markets (of which they have 11 right now) in which the animals are put on a scale and the bidders publicly announce their offer prices for each animal depending largely on its weight. The ARSC charges about 10 to 15 Dinars per head of sheep and between 100 and 150

³⁵⁴ Discussion with Dr Hassan Mohamed Nur, *supra* n. 7.

³⁵⁵ See WTO, *Accession of Sudan: Memorandum on the Foreign Trade Regime* (WT/ACC/SDN/3, 26 January 1999). p. 5.

³⁵⁶ According to Aklilu, "Compared to its neighbors, Sudan has a formidable force of trained manpower in the animal health discipline, consisting of some 1,350 vets working in the public sector, about 750 in institutions and universities, some 1,075 private practitioners and 663 vets in various occupations." See Aklilu (2002, Vol. I), *supra* n. 20, p. 74.

³⁵⁷ See Mtula, PPLPI 2003.

³⁵⁸ Aklilu (2002, Vol. I), *supra* n. 20, p. 75.

³⁵⁹ See WTO, *Accession of Sudan: Memorandum on the Foreign Trade Regime* (WT/ACC/SDN/3, 26 January 1999). p. 24.

³⁶⁰ Discussion with Dr Mustefa Ismail Elhag, ARSC, 28 February 2007, Khartoum.

Dinars per head of cattle. The amount of charge they can levy is apparently set by federal law.

3.3 Common Practices and Challenges in IGAD Livestock Trade Regulation

The highlights of the three legal systems in the preceding section reveal that significant differences exist among these legal systems. While Ethiopia's may be considered to be more of a continental law type, and Kenya's of the common law type, Sudan's is the product of three different legal traditions - common law, continental law and Islamic law. In terms of institutional capacity to set and enforce laws and standards, too, differences exist among these countries, Kenya being the obvious leader. Probably the same could be said about the degree of administrative efficiency, transparency and particularly access to the law.³⁶¹

However, as IGAD member states face increasingly similar challenges in the livestock sector, their policy responses and measures at the national level are also increasingly looking similar. Although the focus of this section will be on the legal and institutional problems shared in common among the three IGAD member states covered here, it is first useful to take a brief look at three areas where practical similarities are apparent: (1) similarities in export formalities and arrangements; (2) a common interest in adding value to their exports; and (3) signs of a lack of commitment to market-based policies in the sector.

3.3.1 Common Practices

Two of the three countries covered in the preceding sections already export a certain quantity of livestock products to the Middle East, particularly to Saudi Arabia. A look at the way these products are exported provides a glimpse of how the laws and institutions of both the exporting and importing countries interact to make the transaction possible. It is interesting to observe that these practices appear to be converging, which at least in part is a result of the fact that all IGAD member states are trying to export to the same countries in the Middle East for which compliance with the latter's requirements is an absolute precondition.

A randomly chosen application file submitted by a livestock exporter to Sudan's Federal Ministry of Foreign Trade contains a copy of the conditions set by the Saudi Animal and Plant Quarantine department, which contains the following six requirements as conditions for the importation of live animals into Saudi Arabia:

"The animals should be accompanied by a valid Health Certificate issued by the relevant authority and Certificate of Origin, and attested by the Saudi Arabian Embassy in the country of origin.

The Health Certificate should include the health condition and the dates of vaccinations against specific diseases and all the conditions required by the Ministry.

The animals should be examined within 24 hours before loading and found healthy and free from any symptoms of infectious and epidemic diseases and external parasites.

All imported consignments should comply with the Veterinary Quarantine Law of the G.C.C. States, its Executive Regulations and the relevant Ministerial and administrative directives.

This permit is valid for (60) days from the date of issue and good for one consignment only.

The Ministry may cancel this Permit in case of banning importation from the country above, before departure of the consignment from the country of origin."

(see a scanned version of the document in Appendix III)

³⁶¹ Note that Kenya is the only country in the region whose laws are freely available on the internet.

The requirements set out in this document fully accord with the information gathered in Addis and Djibouti from exporters as well as the Saudi Arabia Embassy in Ethiopia. It is thus possible to take these requirements as an accurate, albeit incomplete, version of Saudi practice on the matter.

Likewise, meat exports from Ethiopia and Sudan to Saudi Arabia are subject to sanitary controls by the importing country's authorities in three main forms: (1) importing country approval of processing facilities within the exporting countries' territories; (2) requirements to produce health and Hallal certificates issued by exporting government authorities, verified by the resident Saudi Embassies (in Addis Ababa or Khartoum); and (3) physical inspection and laboratory testing of imports on arrival in Saudi Arabia.

A second feature relates to the shared interest among IGAD member states to add value to their exports in this sector. A good example here is the apparent policy convergence among the three countries in the area of leather exports, on which they share largely the same problems of traditional slaughtering practices,³⁶² poor handling (sheering, skinning, etc.) practices, animal diseases, and inadequate technical expertise in the field. Ethiopia's Raw Hide and Skin Marketing System Proclamation³⁶³ and Kenya's Hide, Skins and Leather Trade Act³⁶⁴ are in many ways similar; both require a license as a condition for engaging in the business of buying of hides, skins or leather for the purposes of resale, tanning, retanning or finishing or for the production of manufactured goods inside the country or for export. Ethiopia bans the export of raw hides and skins³⁶⁵ (which is vulnerable to challenge under the WTO, except of course that Ethiopia is not yet a member of the WTO) while Kenya and Uganda apply a tax of 25% and 20% respectively on the exportation of raw hides and skins.³⁶⁶ Given the natural interest of these countries to enhance their export revenues, these measures clearly look self-defeating. However, their mission is also equally clear. By restricting or prohibiting the export of raw hides and skins, the measures intend to encourage the domestic tanning and leather industries to invest in further processing within those countries.³⁶⁷

Finally, it is interesting to observe that Ethiopia and Sudan in particular seem to share some regulatory anomalies in the livestock sector. Although Sudan has been following a clearly market-oriented economic policy since the early 1990s, in 2002, the

³⁶² According to Abdissa Adugna, Secretary General of the Ethiopian Tanners, Footwear and Leather Garments Manufacturers Association, only 20% of animal slaughters in Ethiopia take place inside licensed abattoirs, thus leading to a waste of hides and skins due to poor slaughtering techniques. Interview held in Addis Ababa, 24 August 2006.

³⁶³ See "Raw Hide and Skin Marketing System Proclamation No. 457/2005", *Federal Negarit Gazeta* 11th Year, No. 45, 15th July 2005.

³⁶⁴ See Chapter 359 of Kenya's laws.

³⁶⁵ The relevant proclamation does not say this explicitly; all it says is: "No person shall transport and sell raw hide and skin to areas not authorized." Article 7 of the Ethiopian "Raw Hide and Skin Marketing System Proclamation No. 457/2005" (*Federal Negarit Gazeta* 11th Year, No. 45, 15th July 2005.) The proclamation does not define what is meant by "areas not authorized", but Abdissa Adugna (*supra* n. 362) considers it as a ban wisely imposed by the government to encourage industries and industry associations like his. It must be recognized, however, that such policies could adversely affect the poor livestock producers as that will give monopoly powers to the national leather processing industry.

³⁶⁶ See Uganda *Diagnostic Trade Integration Study*, Vol. 1, June 2006, pp. 29-30, available at <http://www.integratedframework.org/countries/uganda.htm>.

³⁶⁷ Kenya was asked to explain the policy objective of this measure during the EAC trade policy review at the WTO in 2006, and Kenya's response was the following: "The leather industry has been one of the key sectors identified for restructuring in view of the poor performance in the past. In this regard the availability of raw materials to encourage value addition in the processing of leather has necessitated the need to impose an export tax for hides and skins." See WTO doc. WT/TPR/M/171/Add.1 (20 December 2006), p. 71.

Government signed an Exclusive Export Agency Agreement (EEAA) with the Gulf Livestock Company (GLC) which is owned by a Saudi prince. This agreement gave the GLC an exclusive agency to export all Sudanese livestock and meat to the Arab world for a period of five years. The arrangement, of course, faced opposition from different segments of Sudan's livestock sector, particularly the exporters, and came to a premature end in 2004.³⁶⁸

Interestingly, Ethiopia almost repeated this Sudanese act when, in 2005, the Government issued a law authorizing the Ministry of Trade and Industry to grant exclusive agency on certain export trade sectors for a limited period of time.³⁶⁹ Although this law was not couched in sector-specific terms, it was de facto aimed particularly at the livestock sector. The idea was thus exactly the same as Sudan's - i.e. if the Ministry granted such a privilege to one foreign company, other companies could enter the same export market only through such a foreign company. The reasons for this were said to include disappointment with the export performance of the sector, a belief that conferring privileged status on foreign companies would attract more foreign investment and enhance exports and to encourage ties between local producers and reputable foreign companies. The plan also faced serious opposition from different quarters and the Ministry has yet to exercise the power vested in it by this proclamation.

3.3.2 Shared Legal and Institutional Problems

Among the many problems identified by stakeholders in IGAD member states, some are either purely legal issues or have a strong legal dimension. The following issues will be discussed here: legal uncertainties (often due to lack of commitment to the principle of rule of law, and in some cases due to federalism), multiple taxation, inadequate regulatory/enforcement capacity (often exacerbated by inter-institutional rivalry or regulatory instability) and inability to tackle market failure.

Legal Uncertainties

The role of law in business is significant and multifaceted. It can encourage or discourage economic activities; a good law enforced properly is a force for stability and predictability in business relations as well as an instrument of managed change and transition. Business thrives in countries with a stable legal system in which property rights are respected, contractual promises upheld, courts are independent and efficient, and their verdicts recognized and enforced. It is impossible to pass a blanket judgement, based solely on the research carried out for this study, on whether or not the national legal systems of the IGAD member states under examination here live up to those and other similar standards. Most of the complaints made by business people in all countries however revolve around these issues.

Interesting examples for this were recounted by Dr Mustefa Ismail Elhag, Deputy Director of Livestock Markets at Sudan's ARSC. In an interview held in Khartoum in March 2007, Dr Mustefa said that federalism has created several problems in Sudan particularly for the livestock industry, and the main problem in his view was the uncertainty about the division of powers between the centre and the states, the latter often acting beyond their powers. He recounted stories of state measures against the interests of ARSC and mentioned two examples in which the ARSC had to take two states, Gezzira and White Nile, to court. The ARSC won both cases but it took the

³⁶⁸ For more on this, see Abubakr Ibrahim Hussein, *Support to Livestock Production and Marketing in Traditional Rain-fed Farming Areas: Report on Livestock Markets and Marketing* (unpublished; November, 2006).

³⁶⁹ See The Granting of Exclusive Agency on Certain Export Trade Sectors for a limited period of time Proclamation No. 440/2005, *Federal Negarit Gazeta*, 11th Year No. 25, 21st February 2005.

courts over five years to reach a verdict. The cost to the company was however too much to justify the very process.³⁷⁰

Another good example of legal uncertainty comes from the contrasting terminologies used, and justifications given, about the fees collected by the Sudanese government from livestock exporters at the port. Both the national Association of Livestock and Meat Exporters and the federal Ministry of Foreign Trade agree that exporters pay 1% of the value of their exports at the port of exit, but while the exporters call that an unfair export duty that only punishes them for engaging in the business, officials of the Ministry³⁷¹ deny the very existence of export duties and explain that these are only business profit taxes, collected at the port merely for administrative convenience. According to the Ministry, the taxes thus collected are later deducted from the final tax paid by the concerned companies. Regardless of the truth or accuracy of either view, what is important is that, whatever the name given, the levy has an obvious export-d discouraging effect; and the confusion in the name of the levy is an expression of the lack of clarity in the legal authority behind the practice. This is a matter of rule of law and the degree of transparency with which it is administered.

Professor Peter Little also argues that cross-border trade (CBT) in the IGAD region suffers from inappropriate policies and laws but he goes further and discusses the problem of enforcement at the local level. According to Little, there is “a great deal of uncertainty about existing policies toward CBT; about what level of administration is responsible for regulating/licensing the activity; and about the rights of CBT traders to engage in trade of legal goods.”³⁷² Little also mentions examples from Ethiopia where regional and local authorities in the eastern part of the country “often are unaware of policy changes at the federal level and, thus, some local actions may actually contradict existing laws and policies of CBT”.³⁷³ Yakob Aklilu also wrote on Ethiopia that the role of the Director of Veterinary Services was “undermined by the federal structure, as regionally-focused veterinary departments were not obliged to report to the federal DVS.”³⁷⁴ Ethiopia then started a restructuring process to overcome this problem, but it is interesting to note that the drive to do so “was initiated by a Saudi livestock and meat trading company which required a centralized and robust veterinary service before they would agree on a deal during trade negotiations in 2004.”³⁷⁵ On this point, it is worth pointing out that MARF officials in the Sudan are confident that the effect of federalism is nil when it comes to their disease control activities. According to Dr Hassan Mohamed Nur, Head of MARF’s Department of Planning and Livestock Economics, despite Sudan’s federal state structure, the laws on animal diseases are applied harmoniously and uniformly all over the country and, although states have power to issue such laws, whatever they do is in full compliance with the laws of the central Government.³⁷⁶

³⁷⁰ Dr Mustefa thinks that some of the problems could be overcome if the federal government were to pass an act clearly delineating the division of powers between the centre and the states regarding the production and marketing of animals and he says that the ARSC has already submitted a proposal for a Livestock Marketing Act to MARF and are awaiting action from the government.

³⁷¹ Meeting with Yousof Abdelkareem Mohamed, Export Director of the Ministry of Foreign Trade, held 28 February 2007, Khartoum.

³⁷² Little, *supra* n. 16, pp. 29-30.

³⁷³ *Id.* pp. 29-30.

³⁷⁴ Aklilu (2006), *supra* n. 24, p. 195. According to Aklilu, Ethiopia then requested a review the status of its DVS from AU-IBAR, which identified a number of problems, including “the disconnect between federal and regional veterinary services, the fragmentation of veterinary laboratory services, an uncoordinated disease surveillance system, the lack of an independent statutory body to control and regulate the veterinary profession, the poor quarantine services” and the like. *Id.*

³⁷⁵ *Id.* p. 195.

³⁷⁶ Discussion with Dr Hassan Mohamed Nur, *supra* n. 7. Almost the same view was echoed by Dr Naway Gubair Naway, Deputy Director of the Quarantine and Meat Hygiene Directorate of MARF.

In sum, legal uncertainty is a serious problem that affects all countries in the region, and not just those with a federal structure. Federalism only exacerbates the problem. For example, Kenya acknowledges that its legal and regulatory framework is “inadequate to address the current and future challenges in disease, pest and quality control”³⁷⁷ and is undertaking a law reform process to ensure that the laws of the country on livestock production and particularly those relating to disease control are up-to-date and fit for the purposes of the day. Ethiopian veterinary officials complain that the federal structure has made it totally impossible for them to discharge their obligations under the OIE.³⁷⁸ Likewise, it has been found in respect of Uganda that “the shift from centralized to decentralized government since 1997 has resulted in much confusion over animal health management. Currently, there is no harmonized livestock movement control system as each district has its own priorities, guidelines and livestock control program. ... The old reporting system between the districts and the center has almost collapsed and, not surprisingly, discussions are underway to recentralize the animal disease reporting and control program.”³⁷⁹ Indeed, already in 2004, Uganda reported to the OIE that it was “considering recentralising most aspects of veterinary services in the country in order to address animal disease problems more effectively.”³⁸⁰

3.3.2.1 Multiple Taxation

Related to the above is the problem of multiple taxation of animals on the move, which is a problem often, encountered by livestock traders in the IGAD region without exception. The problem appears to be rather acute in countries with a federal structure, Ethiopia and Sudan in our case. Aklilu wrote that “exporters from Ethiopia and Sudan have to pay myriad taxes and fees for live animals or chilled/frozen meat.”³⁸¹ But, the problem is at its worst in the Sudan. Virtually everyone with interest in the livestock sector consulted in Khartoum agreed that multiple taxation of livestock products at both federal and state levels is the most pressing problem for Sudan’s livestock industry. Aklilu provides an excellent collection of the types of taxes that apply on a product from its state of origin in Sudan to the port of exportation.³⁸² According to Aklilu, “Sudan probably applies the most excessive and complex fees and taxation system on livestock trading in the region. Different sources vary but some studies suggest that taxes and fees constitute up to 27% of the cost of the exported animal and may go up to 40% if fodder is included. Most agree that there are over 20 types of taxes and fees between points of purchase and Port Sudan.”³⁸³

It is notable that Aklilu’s findings on Sudan here predate the complex constitutional structure that was introduced in 2005. But, the taxation problem was exacerbated after the introduction of the 2005 Interim National Constitution, and a 2007 World Bank-led mission observed that although the 2005 Comprehensive Peace Agreement (CPA) assigns exclusive competence over Sudan’s import tariff and customs duty collection to the national government, the national customs department “conducts operations at the Juba airport using the national tariff schedule” while customs

³⁷⁷ See *Draft Sessional Paper*, *supra* n. 33, p. 27.

³⁷⁸ Discussions with officials of Ethiopian federal veterinary officials, held August 2006.

³⁷⁹ See Uganda *Diagnostic Trade Integration Study*, Vol. 1, June 2006, p. 62, available at <http://www.integratedframework.org/countries/uganda.htm>.

³⁸⁰ See *World Animal Health 2004*, *supra* n. 147, p. 348, emphasis added.

³⁸¹ According to Aklilu, livestock are “the most repeatedly (and perhaps the most highly) taxed agricultural commodity in the region. In Sudan, livestock traders pay taxes and transit fees in about 20 places en route to the terminal markets/final destinations. In Ethiopia, livestock are taxed a number of times as transit commodities within the country, the amount paid per head varying from place to place. ... Livestock are less repeatedly taxed in Kenya.” Aklilu (2002, Vol. I), *supra* n. 20, p. 2.

³⁸² See *Id.* pp. 70-71.

³⁸³ See *Id.* p. 69.

officials from the Government of Southern Sudan “are still performing these duties and collecting customs using tariff rates set by the SPLM in 2000.”³⁸⁴

This naturally affects the interest of businesses engaged in livestock trade in general and the exporters in particular. Members of Sudan’s Livestock and Meat Exporters’ Association complain that the lack of constitutional clarity in the division of powers between the states and the federation means that states in particular are very keen to try every possible source of revenue they can lay their hands on. They argue that the taxes are many in number and come in different names and guises - ownership taxes, grazing taxes, marketing taxes, transit taxes, etc. A table compiled by the Association lists over 20 different taxes and fees that are paid per exported animal throughout the entire production, transportation and marketing chain. According to the Association, the sum total of these taxes often comes to equal the initial purchase price of the animal from the farmer and sometimes even exceeds it, making it difficult for these animals to be priced competitively in foreign markets.

It has been found, in the case of Sudan, that “the burden of livestock taxation falls mainly on traders” and elimination of all forms of internal taxation has been recommended by different studies. States and local authorities in Sudan levy such taxes because they lack the necessary resources to provide public services. An obvious way of overcoming that is for the national government to ensure that such budgetary issues are resolved by other means. Indeed, governments in the region must realize that their exports often compete against highly subsidized products coming from Europe and other developed countries and the question IGAD member states must ask here is not whether or not to reduce the burden of taxation on livestock exports, but whether exports should pay taxes at all. While exemption from taxation of only exports might in principle qualify as an export subsidy, the WTO SCM Agreement already provides that “the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.”³⁸⁵ Moreover, it is also worth remembering that the main livestock exporters in the region are not yet members of the WTO, and even then, LDCs benefit from certain flexibilities under the SCM Agreement. The main challenge therefore is not legality of such measures but rather their affordability - i.e. whether government revenue shortfalls resulting from forgoing taxes on exports can be covered from other sources. Given the small tax base and the poor tax collection capacity in these countries, this might be a difficult measure to take in the short term. However, ease of tax collection at the port of exit must not be allowed to kill the future of a potentially competitive industry.

3.3.2.2 Access to Legal Information

Accessibility of laws to the general public is another area of concern identified during the field research for this study. In general, access to the official gazette is a problem in virtually all the countries surveyed except Kenya. However, having difficulty accessing the laws of a country is one thing, asking relevant government authorities and being told that the laws are confidential and access to them requires authorization from above is quite another. This is almost exactly what happened in two of the four countries visited during this study. The confidentiality of laws meant to be enforced on a daily basis is difficult to reconcile with the idea of government by law.

³⁸⁴ See *Sudan Integrated Framework Diagnostic Trade Integrated Study Aide Memoire on Second Technical Mission* (February, 2007), p. 3, available at <http://www.integratedframework.org/countries/sudan.htm>.

³⁸⁵ See footnote 1 to Article 1 of the SCM Agreement.

3.3.2.3 Institutional Rivalry among Different Government Departments

It is the unfortunate reality in many IGAD member states that a lot of time and scarce resources are lost due to inter-institutional rivalries within national governments, partly due to ambiguities in the allocation of powers and responsibilities among different government organs and partly because of a lack of stability and continuity in the institutional home of the livestock sector. Aklilu observed, regarding Ethiopia, that the relationship between the country's Livestock Marketing Authority and the federal Department of Veterinary Services was strained because of a lack of clarity in the overlapping roles and responsibilities held by the two institutions (e.g., in the areas of quality control and licensing).³⁸⁶ An interview with a member of the Ethiopian Meat Manufacturing Exporters Association revealed that people from the Ethiopian Ministries of Agriculture and Health would often argue for power over inspection and certification of meat exports which often left the clients (i.e. the businesspeople seeking approval for their exports) mediating between the two ministries, and usually the exporters would end up paying to both ministries for effectively the same service.³⁸⁷ Similar problems have been encountered even in the more mature Kenyan legal system.³⁸⁸ Finally, the 2006 Integrated Framework Concept Note on Sudan stated that the country "faces an unusually fragmented trade policy-making process" in which EPA negotiations, WTO accession, and membership in COMESA are given to three different National Government bodies - the Ministry of Foreign Trade, the Commission on WTO Affairs, and the Ministry of International Cooperation.³⁸⁹

3.3.2.4 Inadequate Capacity to Respond to Market Failures

A legal system that allows the free interplay of market forces does not necessarily mean fewer rules than in regulated markets; it only means different types of rules and a different type of regulation. The most business-friendly legal systems are those that allow free competition but also ensure that such competition is fair. That is where competition law, also called anti-trust law, comes in. Its object is to protect and promote competition on the market with a particular focus on the structure and behaviour of private business enterprises. Competition law is a key element of virtually all advanced national legal systems based on free market principles. Competition law is concerned with the structure and behaviour of enterprises on the market. It aims to create a market in which producers and traders compete freely on the quality of products and services they offer and the prices they charge rather than through the improper exercise of market power, whether acquired unilaterally or in concert with others. The competition laws of almost all countries target and discourage or even prohibit two forms of practices by business enterprises: (1) concerted practices such as price-fixing and market-segmentation cartels (hereafter

³⁸⁶ See Aklilu (2002, Vol. I), *supra* n. 20, p. 52.

³⁸⁷ Interview held at the Association's office in Addis Ababa, 28 August 2006.

³⁸⁸ The Kenyan Ministry of Livestock and Fisheries recently wrote that enforcement of animal health and product quality standards has been "complicated by conflicting legal mandates, particularly between the Public Health Act (Cap 242) and the Meat Control Act (Cap 356). The Department of Veterinary Services inspects meat in 54 out of the 71 districts. Bodies responsible for control of veterinary drugs and pesticides are variously placed in the Ministries of Health and Agriculture (Cap 244- Pharmacy and Poisons Act and Cap 346-Pest Control Products Act). However, the Department of Veterinary Services has no control over these conflicting statutes on drugs or pesticides. There is, therefore, need for harmonizing these conflicting mandates in order to adequately address animal health and product quality standards." See *Draft Sessional Paper*, *supra* n. 33, p. 11.

³⁸⁹ See *Sudan Integrated Framework Diagnostic Trade Integration Study* (P090244): *Concept Note* (October, 2006) p. 15, available at <http://www.integratedframework.org/countries/sudan.htm>.

anti-competitive agreements); and (2) abuse of dominant positions such as monopolies (hereafter disciplines on dominant market positions).³⁹⁰

It appears that several IGAD member states, including Ethiopia³⁹¹ and Kenya³⁹², have laws on competition. However, these laws are not being enforced fully, at least not in the livestock sector. For example, Aklilu found that, since the collapse of the KMC, the only Kenyan abattoir licensed to supply meat to Europe, many pastoralists and livestock traders lost from two sides. Firstly, they lost their quota-secured right of access to the EC market, which “greatly reduced the total volume of off-take from pastoral areas”. Second, the producers lost in the competition within their own market in favour of what Aklilu calls a cartel of butcheries.³⁹³ Aklilu argues that the absence of “facilities for livestock to stay overnight in the markets” has played into the hands of the butcheries. This has allowed butcheries to deliberately slow down the negotiation process for the price of animals so as to put pressure on the traders who have to sell their animals before dusk.³⁹⁴ The practice described by Aklilu appears to raise several issues of competition law, such as collusion and abuse of dominant position on the part of the butcheries, which could possibly fall foul of Kenya’s 1988 law on restrictive business practices.³⁹⁵ Officials from Kenya’s Ministry of Livestock and Fisheries Development also confirmed that a de facto cartel of middlemen, retailers and abattoirs controls the livestock market at the expense of the producers.³⁹⁶ According to section 6 of Kenya’s law on restrictive business practices, any agreement or arrangement between persons engaged in a business “to buy, or offer to buy, goods at prices or on terms agreed upon between themselves” – exactly the sort of behaviour described by Aklilu above – is considered a restrictive business practice that normally is an offence punishable by imprisonment for up to two years or a fine up to one hundred thousand Kenyan Shillings or both. It is worth pointing out that similar practices were found by Aklilu in the Ethiopian market, raising effectively the same competition law issues under the 2003 Trade Practice Proclamation.³⁹⁷ This law regulates a wide range of what could be called anti-competitive business practices aimed at nurturing the free market economic policy of the present government. The new law covers three forms of anti-competitive practices: (1) concerted practices such as price-fixing, market segmentation and similar cartel-like arrangements among economic operators; (2) unfair commercial practices such as acts intended to damage the reputation of competitors or their products and services; and (3) abuse of dominant market positions such as impeding the market entry of new competitors or use of predatory pricing and similar techniques to drive existing competitors out of the market. Not only are such practices prohibited, their violations could also lead to administrative measures ranging from suspension or cancellation of the business

³⁹⁰ See e.g. EC Treaty Articles 81 and 82 respectively together with the 1989 Merger Regulation (Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *O. J.* 1989, L 395, at 1-12).

³⁹¹ See “Trade Practice Proclamation No. 329/2003”, *Federal Negarit Gazeta* 9th Year, No. 49, 17th April 2003.

³⁹² See for example Kenya’s Restrictive Trade Practices, Monopolies and Price Control Act (Cap. 504 of the Laws of Kenya in 1988 and the Act was published in Kenya Gazette of Friday, 23rd December 1988.

³⁹³ See Aklilu (2002, Vol. I), *supra* n. 20, pp. 7-8.

³⁹⁴ The butchers “make the best deals for themselves as the day progresses since livestock traders have no choice but to sell their animals. ... The groups benefit from a law ... mandating that livestock from high-risk areas ... have to be slaughtered immediately.” *Id.* p. 9.

³⁹⁵ See Kenya’s Restrictive Trade Practices, Monopolies and Price Control Act (Cap. 504 of the Laws of Kenya in 1988 and the Act was published in Kenya Gazette of Friday, 23rd December 1988.

³⁹⁶ Interview with Mr Samuel Yegon, Kenya’s Ministry of Livestock and Fisheries, held in Nairobi, 6 September 2006.

³⁹⁷ See “Trade Practice Proclamation No. 329/2003”, *Federal Negarit Gazeta* 9th Year, No. 49, 17th April 2003.

licence to operate down to the imposition of fines worth up to about US\$ 5,500. The presence of practices described by Aklilu, if proven in a legal sense, raises issues not of competition law and policy but of capacity to enforce laws that are technically so complex by nature.

3.3.2.5 Inadequate Formal Communication Channels between Government and Private Sector Interest Groups

An important feature of the legal framework applying to trade in livestock products, and indeed trade in all products, in the IGAD member states is the absence of a formalized process of communication between private business people who do most of the actual trading across borders and national governments. If we take the WTO system as an example, it is a system with teeth but it can bite only if the governments decide to make use of its mechanisms. Governments have the power but their officials rarely take direct part in the actual operation of the business that suffers, while those who suffer do not have the power to set the teeth of the system into action. Several WTO members, particularly the developed ones such as the EU and the US, have put in place an elaborate mechanism through which the grievances of the business operator will be taken up by the public authorities at the WTO level. This mechanism in the EU is contained in a law called the Trade Barriers Regulation³⁹⁸ while the US's is called Section 301.³⁹⁹ This is not necessarily to suggest that IGAD member states must copy such sophisticated mechanisms from the EU or the US; but it certainly teaches the important lesson that talking to the businesspeople in the field of livestock is not a favour that government officials entertain out of good will, and that can be taken away at any time without legal consequences; rather, it must be an important part of the overall rule of law and accountability system that this study considers critical for these countries.

3.4 Conclusion

This chapter has shown that although the three legal systems covered here are different from each other in significant ways, there are also signs of convergence dictated by the commonality of the challenges they face and the similar requirements they have to meet in order to participate in the international market for livestock products. The regulatory challenges they face are also increasingly similar and include legal uncertainties often signifying weak and inefficient judiciary, disregard for the rule of law in day to day administrative decision making, lack of effective coordination among different levels of government in the enforcement of laws, absence of established communication channels between livestock business operators and relevant government institutions and overall lack of capacity to use law as an instrument of implementing policy decisions. IGAD as a regional economic organization has the potential to resolve some of these issues, but this potential is currently under question due to the involvement of IGAD member states in other competing and/or overlapping regional and bilateral arrangements. Until the IGAD member states manage to put together common policies and rules in the sector with an effective implementation strategy, their trade interests will continue to suffer and the poor livestock producers will continue to bear the full brunt of it. The next chapter will use EU sanitary and food law to demonstrate how IGAD member states' inability to satisfy international sanitary standards effectively excludes their livestock products from some of the most attractive markets in the world despite long-standing rights of preferential terms of market access.

³⁹⁸ Council Regulation 3286/94 of 22 December 1994, O.J. 1994 L 349/71.

³⁹⁹ See *United States – Sections 301-310 of the Trade Act of 1974*. For more on this, see Marco Bronckers and Natalie McNelis, "The EU Trade Barriers Regulation Comes of Age", 35 *Journal of World Trade* (August 2001) 427-483, and Greg Shaffer, *Defending Interests: Public-Private Participation in WTO Litigation* (Brookings Institution, Washington, D.C. 2003).

CHAPTER 4. EFFECT OF SANITARY STANDARDS ON IGAD EXPORT OPPORTUNITIES: A CASE STUDY OF THE EC

The EU is the most highly sought after market for sub-Saharan Africa's agricultural products in general, and IGAD member states have long-standing preferential access to this market. In this chapter, we shall look at the EU's trade policy measures in general, and sanitary measures in particular, that affect the trade interest of IGAD member states. The purpose here is to emphasise the point that the fate of the livestock industry in the IGAD region depends fundamentally on its ability to raise its health and safety standards.

4.1 European Trade Law and IGAD Livestock Products

The EU is a highly coveted market for IGAD livestock producers and traders. The EU also has long-standing non-reciprocal preferences for goods originating from IGAD member states, which in principle also applies to livestock products. We shall see however that, despite the trade-friendly rules put in place by the EU for the benefit of IGAD member states, the EU livestock product market remains totally closed for IGAD producers.⁴⁰⁰ Indeed, as Christopher Stevens put it, the reason why the EU is an attractive market in price terms for IGAD products is precisely because it is heavily protected against competition from abroad with a view to maintaining prices at artificially high levels.⁴⁰¹

In order to understand the reasons behind this, a brief look at the EU trade regime in the livestock sector is provided, focusing mainly on the beef/veal sub-sector. This sub-sector is chosen here for two reasons: (1) it is a sub-sector in which IGAD member states have significant export potential; and (2) there is already a beef/veal protocol to the Lomé-Cotonou agreements that aims to provide guaranteed access to the EU market for a handful of ACP countries, one of which is Kenya. An understanding of whether and how far this system has succeeded in opening the European market for the supposed beneficiaries is key to our search for the types of trade policy reasons behind the inability of IGAD member states to benefit from livestock exports thereby informing the type of policy recommendation that we will come up with in order to improve the situation.

4.2 The EC Livestock Trade Regime: a Closer Look at the Beef/Veal Sub-Sector

Virtually all livestock products in Europe are subject to common market organizations which are often designed to stabilize markets and support producers in different ways

⁴⁰⁰ Indeed, EU export subsidies in the livestock sector are already making competition difficult for IGAD exporters in such attractive potential markets for IGAD countries as South Africa. The ACP-EU Joint Assembly recognized this problem as early as 1997, and its assessment was unusually frank and straightforward. It stated, inter alia, that between 1991 and 1997 alone, EU beef exports to South Africa rose tenfold selling at an average landed price for EU frozen boneless beef of Rand 2.66 per kg, "which in 1996 was 51% below the domestic South African wholesale price". The Joint Assembly further recognized that "this massive expansion of subsidised EU beef exports to South Africa has resulted in income losses to South African, Botswanan, Swaziland and Namibian cattle farmers totalling hundreds of millions of Rand," which they said constituted "a fundamental incoherence between EU development cooperation policy objectives in favour of rural development in livestock dependent economies and the current application of this particular instrument of the Common Agricultural Policy." See *Joint Assembly of the Convention concluded between the African, Caribbean and Pacific States and the European Union (ACP-EU) - Resolutions adopted on the impact of subsidized EU beef exports* (ACP-EU/2135/97/fin.), O.J. C 308, 09/10/1997 pp. 0050-0051.

⁴⁰¹ Private communication with Christopher Stevens.

as envisaged under Article 33 of the EC Treaty.⁴⁰² As the EU Commission wrote in an action against Greece, provisions for intra-community trade in live animals are “completely harmonised. ... Member States may not impose any additional requirements to those provided for under EU legislation, nor can they unilaterally decide to interrupt imports from any third country which has been approved by the Commission for export to the EU.”⁴⁰³

This is true of products from pigs,⁴⁰⁴ cattle,⁴⁰⁵ sheep and goats⁴⁰⁶ and poultry⁴⁰⁷ (including eggs⁴⁰⁸). Although the common market organization for each sector is different, reflecting the differences in the very nature of the animals and the sub-sectors, they share certain features in common.⁴⁰⁹ These include the provision of different forms of support to producers that are increasingly taking the form of direct income support;⁴¹⁰ the requirement of a licence as a condition of importation and, in some cases, exportation; the imposition of specific and ad valorem tariffs on importation (which often vary depending on the quantity and origin of imports in the form of general or country-specific tariff quotas)⁴¹¹; and the use of export refunds on the exportation of these products equal to the difference between prices within the Community and on the world market.⁴¹² There are also other mechanisms by which

⁴⁰² The objectives of the EC common Agricultural Policy are set by Article 33 of the EC Treaty and include: increasing agricultural productivity, ensuring a fair standard of living for the agricultural community, stabilising markets, and assuring availability of supplies at reasonable prices for the consumer.

⁴⁰³ See <http://ec.europa.eu/agriculture/newsdigest/2007/168.htm#cnt9>.

⁴⁰⁴ Regulation (EEC) No 2759/75 of the Council of 29 October 1975 on the common organization of the market in pigmeat, *OJ L* 282, 1.11.1975, p. 1–9.

⁴⁰⁵ Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal *OJ L* 160, 26.6.1999, p. 21–47.

⁴⁰⁶ Council Regulation (EC) No 2529/2001 of 19 December 2001 on the common organisation of the market in sheepmeat and goatmeat *OJ L* 341, 22.12.2001, p. 3–14.

⁴⁰⁷ Regulation (EEC) No 2777/75 of the Council of 29 October 1975 on the common organization of the market in poultrymeat *OJ L* 282, 1.11.1975, p. 77–83.

⁴⁰⁸ See Regulation (EEC) No 2771/75 of the Council of 29 October 1975 on the common organization of the market in eggs, *OJ L* 282, 1.11.1975, p. 49–55, as amended.

⁴⁰⁹ The European Commission describes what it calls the “classical elements of the Common Agriculture Policy” as “relatively high support prices sustained by subsidised withdrawal and storage of surplus product (‘public intervention’), subsidised schemes to dispose of surpluses on the EU market and export subsidies for disposal on world markets.” Although the key instruments of this classical system are still in place, several changes have taken place over the past few years which take European agriculture in the direction of market forces. See EC, *Milk and Milk Products in the European Union* (2006), p. 16, available at http://ec.europa.eu/agriculture/publi/fact/milk/2007_en.pdf.

⁴¹⁰ For beef and veal, Council Regulation 1254/1999 provides for different forms of support to producers, including the so-called ‘special premium’ (Art. 4), ‘deseasonalisation premium’ (Art. 5), ‘suckler cow premium’ (Art. 6–10), ‘slaughter premium’ (Art. 11), ‘extensification payment’ (Art. 13) and ‘additional payments’ (Art. 14). For pigmeat, see Regulation (EEC) No 2759/75, Arts. 2–7; etc.

⁴¹¹ For pigmeat, see Regulation (EEC) No 2759/75, Arts. 8–11; for beef and veal, see Council Regulation 1254/1999, Arts. 29–32; etc.

⁴¹² For beef and veal, see Art. 33 of Council Regulation 1254/1999; for pigmeat, see Regulation (EEC) No 2759/75, Art. 13; etc. The language often used by relevant EC regulations in the case of export refunds is notable for its straightforwardness as to its trade distortive and protectionist purpose. The regulation establishing the common market for pigmeat states that its export refunds are designed so as to “safeguard Community participation in international trade in pigmeat”. See recital 11 of Regulation (EEC) No 2759/75. The European Commission recently admitted in the context of dairy products as follows: “As the EU market price is higher than the world price for dairy products, exports generally take place with the aid of export subsidies. Following the 1994 multilateral trade agreement (known as the Uruguay Round) of the World Trade Organisation (WTO), export subsidies have been restricted –

regulatory bodies could directly intervene in the market, such as the granting of aid for private storage and, in case of large price falls, even intervention buying by public agencies designated as such by member states.⁴¹³ The Commission has issued a host of regulations implementing the often general disciplines contained in the Council regulations mentioned above.⁴¹⁴ Finally, as we shall see below in more detail, the EC market in livestock products is fully and effectively protected from competition coming from most poor developing countries the likes of IGAD member states by the high and ever-rising health and sanitary measures that are neither negotiable multilaterally nor subject to any preferential treatment. In all cases, the regulations routinely stipulate that the common market organizations for specific products must respect Community obligations 'resulting from agreements concluded in accordance with Article 300 of the Treaty or from any other act of the Council' or some language to that effect. This reference often means the WTO disciplines in the agricultural sector, but also includes such bilateral arrangements of the EC with other countries and groups as the Lomé-Cotonou with the ACP countries, and a host of other free trade agreements with several other countries. It is worth noting however that the sheer number and technical complexity of EC agriculture legislation, not to mention the high speed with which changes are introduced to this law, make it particularly difficult for businesses and governments of most developing countries to work through the system and participate in the rich and potentially lucrative European market for livestock products.

The effect of all these policy instruments is that the EU has been a surplus producer of meat products for several decades now. According to Eurostat data, EU production of livestock products for 2004 stood at 106% of domestic consumption. In terms of the different meat types, the degree of self-sufficiency of EU-15 in the same year was 101% for cattle, 109% for pigs, 81% for sheep and goats, 107% for poultry and 38% for equidae.⁴¹⁵ On the same data, "imports of meat and meat preparations to the EU-15 from third countries increased from 910 thousand tonnes in 1995 to 1,481 thousand tonnes in 2004 In 1995, half of EU-15 imports came from New Zealand (24%), Argentina (15%) and Brazil (13%). In 2004, Brazil supplied more than one third of all EU-15 imports (37%), followed by New Zealand and Poland which supplied 14% and 10% of EU-15 imports respectively. Meat and edible offal of poultry corresponded to the type of meat most imported from third countries into the EU-15, 337 thousand tonnes in 2004, having increased on average by about 10% per year between 1995 and 2004."⁴¹⁶ In the dairy sector, the EU maintains very high tariffs along with several country-specific and MFN tariff quotas.⁴¹⁷

both the quantities exported and the amount of total subsidies paid out are strictly limited." See EC Milk and Milk Products, *supra* n. 409.

⁴¹³ For pigmeat, see Regulation (EEC) No 2759/75, Arts. 3-5; for beef and veal, see Council Regulation 1254/1999, Arts. 26-27.

⁴¹⁴ See for example Commission Regulation (EC) No 1745/2006 of 24 November 2006 beef tariff quotas in beef and their administration (*OJ L* 329/22, 25.11.2006); Commission regulation (EC) No 1344/2006 of 12 September 2006 fixing the export refunds on pigmeat (*OJ L* 249/13, 13.9.2006), Commission regulation (EC) No 1346/2006 of 12 September 2006 fixing the export refunds on poultrymeat (*OJ L* 249/17, 13.9.2006); Commission Regulation (EC) No 1048/2006 of 10 July 2006 amending Regulation (EC) No 2185/2005 opening Community tariff quotas for 2006 for sheep, goats, sheepmeat and goatmeat (*OJ L* 188/3, 11.7.2006); and Commission Regulation (EC) No 1343/2006 of 12 September 2006 fixing the rates of the refunds applicable to eggs and egg yolks exported in the form of goods not covered by Annex I to the Treaty (*OJ L* 249/11, 13.9.2006).

⁴¹⁵ See Lourdes Llorens Abando and Anna Maria Martinez Palou, *Statistics in focus Agriculture and Fisheries*, Eurostat 6/2006, Figure 3, p. 2.

⁴¹⁶ *Id.*

⁴¹⁷ As the Commission itself observed: "There are only minimal imports at full tariff. However, many of the EU's trading partners benefit from special import arrangements – known as Tariff Rate Quotas (TRQs) – whereby imports can come in at lower tariffs. Some of the TRQs are specific to particular

4.3 IGAD Livestock Products under the EC-ACP Preferential Agreements

As noted earlier, the EU has long-standing non-reciprocal preferences for goods originating from the IGAD member states. This is done through a combination of two different instruments – the unilateral initiative by which the EU allows duty- and quota-free importation of virtually all products from all least-developed countries under its GSP scheme,⁴¹⁸ and the bilateral Lomé-Cotonou agreements between the EC and the African, Caribbean and Pacific countries (ACP). The trade aspect of the Cotonou agreement is expected to be replaced by new inter-regional free trade agreements, called Economic Partnership Agreements, between the EC and each of the ACP sub-regions as of January 2008.⁴¹⁹

4.3.1 The Cotonou Agreement

Under the terms of the Cotonou agreement, while non-agricultural imports from the ACP countries receive duty- and quota-free treatment, agricultural products are subject to less generous levels of preferences which depend on whether or not a particular product is subject to the EC Common Agricultural Policy (CAP).⁴²⁰ For agricultural products falling under the latter category, the EU's obligations are limited to providing a better-than-MFN treatment.⁴²¹ In practice, however, the EC removed the ad valorem tariffs on beef already at the conclusion of the Cotonou Agreement in 2000,⁴²² later incorporated into Council Regulation (EC) No 2286/2002 on the arrangements applicable to agricultural products and goods resulting from the processing of agricultural products originating in the ACP States.⁴²³

exporting countries; others are open to all under the most-favoured nation (MFN) system. TRQs are not always filled (i.e. fully utilised). Those for powders (about 70,000 tonnes) are hardly used; there are TRQs for several different cheese types – amounting to just over 122 000 tonnes – the average fill rate is 40%; the butter TRQs of approximately 89 000 tonnes are always filled.” See EC Milk and Milk Products, *supra* n. 409.

⁴¹⁸ See discussion on the EBA initiative, *infra* section 4.3.3. And it is worth noting that all IGAD countries except Kenya fall into this category.

⁴¹⁹ On EPAs, see Melaku Gebeye Desta, “EC-ACP Economic Partnership Agreements and WTO Compatibility: An Experiment in North-South Inter-Regional Agreements?”, 43(5) *Common Market Law Review* (2006) pp. 1343-1379.

⁴²⁰ See Article 168 of Lomé IV in particular. The first paragraph of this Article provided the principle that products originating in the ACP States shall be imported into the Community free of customs duties and charges having equivalent effect. However, paragraph 2 singled out agricultural products and stipulated that such products would be imported as follows: “(i) those products shall be imported free of customs duties for which Community provisions in force at the time of import do not provide, apart from customs duties, for the application of any measure relating to their import; (ii) for products other than those referred to in point (i), the Community shall take the necessary measures to ensure more favourable treatment than that granted to third countries benefiting from the most-favoured-nation clause for the same products.

⁴²¹ Article 1 of Annex V to the Cotonou Agreement provides: “For products originating in the ACP States listed in Annex I to the Treaty where they come under a common organization of the market within the meaning of Article 34 of the Treaty, or subject, on import into the Community, to specific rules introduced as a result of the implementation of the common agricultural policy, the Community shall take the necessary measures to ensure *more favorable treatment than that granted to third countries benefiting from the most-favored-nation clause* for the same products.”

⁴²² See special courier edition of the Cotonou Agreement.

⁴²³ Council Regulation (EC) No 2286/2002 of 10 December 2002 further improved the duty levels for ACP agricultural products by providing that the tariff preferences applying to ACP countries under this Regulation “shall be calculated on the basis of the rates of the autonomous duty where, for the products concerned that duty is lower than the conventional duty as laid down in the Common Customs Tariff.” *OJ L* 348, 21.12.2002, Article 4, pp. 5-41.

The practical implications of this development can be illustrated by looking at how the Regulation treats ACP beef imports (CN Code 0201 ('meat of bovine animals, fresh or chilled') and 0202 ('Meat of bovine animals, frozen')) with a view to implementing the Cotonou promise. Accordingly, the ad valorem duties on these products have been eliminated in full, and this applies to beef and veal coming from all ACP countries. This in principle gives ACP countries a significant advantage over MFN suppliers that have to pay, according to the 2007 version of the EC customs tariff⁴²⁴ on these product categories, a 12.8% ad valorem duty. The specific duties normally charged on top of these ad valorem duties are the same for both ACP and non-ACP suppliers. For example, the duty applying to CN Code 0201 10 00 10 (high quality beef and veal) imported from Pakistan, a non-ACP country, would be 12.8% ad valorem plus €176.8/100 kg while the duty applying on the importation of the same product from Mauritius, an ACP country, would be 0% ad valorem plus €176.8/100 kg. This 12.8% ad valorem is effectively the preference margin that the ACP countries enjoy over the standard MFN suppliers.⁴²⁵ We shall see, however, that six ACP countries, including one from IGAD – Kenya – benefit from a special arrangement known as the beef/veal protocol under which they are allowed to import beef and veal subject to much reduced specific rates on top of the exemption from ad valorem duties that is available to all ACP countries.

4.3.2 The Beef/veal Protocol

Four agricultural products – bananas, rum, sugar, and beef/veal – have also been subject to protocols annexed to the Lomé agreements and provided duty-free (except on beef/veal) access for fixed quantities of the products under a tariff quota scheme and, in the case of beef and sugar, providing further access to guaranteed minimum prices similar to those applying to like EC products.⁴²⁶

The beef/veal protocol was formally established as such in 1990 as part of the Lomé IV.⁴²⁷ Protocol 7 to Lomé IV provided, inter alia, for country-specific quotas for which

⁴²⁴ See Part Two of Annex I to EC Customs Schedules 2007, *supra* n. 41.

⁴²⁵ Note however that the EC also allows limited quantities of beef imports from non-ACP countries on more favourable terms under its WTO minimum access commitments. Accordingly, there is a WTO tariff quota for 'high quality meat of bovine animals, fresh, chilled or frozen' of 37,950 tonnes at the flat *ad valorem* duty rate of 20%, but this is allocated to five supplying countries as follows: Argentina (17,000 tonnes), USA/Canada (11,500 tonnes), Australia (7,150 tonnes), and Uruguay (2,300 tonnes). It is interesting to note that the EC also has a large quota for sheep meat and goat meat (CN code 0204), of which the Community is a net-importer and the IGAD countries a potentially competitive supplier. The size of the quota is set at 283,715 tonnes (of carcase weight) at the attractive duty rate of 0%. However, this quota is allocated to supplying countries as follows: Argentina (23,000 tonnes), Australia (18,786 tonnes), Chile (3,000 tonnes), New Zealand (227,854 tonnes), Uruguay (5,800 tonnes), Iceland (600 tonnes), Romania (75 tonnes), Bulgaria (1,250 tonnes), Bosnia Herzegovina (850 tonnes), Croatia (450 tonnes), Former Yugoslav Republic of Macedonia (1,750 tonnes), Greenland (100 tonnes), and 'other' (200 tonnes). The ACP countries are not to be found anywhere in this list. See Commission Regulation (EC) No 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, *OJ L* 301, 31.10.2006, p. 33. For the WTO tariff quotas, see Annex 7 to this Regulation, p. 836.

⁴²⁶ For commitments on sugar and beef, see Protocols 3 and 4, respectively, to the Cotonou Agreement. EC Commission statistics showed that 99.2% of imports from ACP countries in 1973, i.e. just before Lomé I, were "covered by the free access rule and the small residue is admitted on preferential terms." See *The Courier No. 31 – Special Issue*, March 1975, p. 23. See also Simmonds, "The Lomé Convention and the New International Economic Order", 13 *CML Rev.* (1976), 315-334. The latest estimate is that 96.5% of all imports originating in the ACP enter the EC duty and quota free. See EC Commission, *Opening the Door to Development: Developing Country Access to EU Markets 1999 – 2003*, p. 22, http://trade-info.cec.eu.int/doclib/docs/2005/august/tradoc_123305.pdf.

⁴²⁷ There was of course a special arrangement for beef and veal under previous Conventions and Lomé IV only put it as "a proper protocol". See *The Courier*, March-April 1990, no. 120, p. 15.

"import duties other than customs duties applicable to beef and veal originating in the ACP States shall be reduced by 90%."⁴²⁸ Lomé IV not only formally established the beef/veal protocol but also raised the overall annual quantity of beef/veal benefiting from the special arrangement from 30,000 tonnes to 39,100 tonnes. This was later raised by another 13,000 tonnes for the benefit of Namibia, which followed that country's independence in 1990 and its accession to the Lomé agreement soon afterwards. This brought the protocol total to its current quantity of 52,100 tonnes.⁴²⁹ The Cotonou version of the beef/veal protocol raised the non-ad valorem tariff reduction commitment to 92%.⁴³⁰

As noted above, Kenya is recognized as a "traditional exporter of beef and veal" and in principle benefits from a 92% reduction of the standard (MFN) non-ad valorem customs duties that would otherwise apply to the importation of ACP beef and veal within quantitative limits set for each qualifying ACP country.⁴³¹ The annual quota for Kenyan beef and veal that can be imported at such reduced tariffs is set at 142 tonnes, expressed in boneless meat.⁴³² EU Council Regulation 2286/2002⁴³³ has implemented this international treaty commitment by doing exactly that - reduce the specific duties by 92% for a maximum annual quota of 52,100 tonnes of boneless meat from Kenya and five other protocol countries (Botswana with 18,916 tonnes, Madagascar 7,579 tonnes, Swaziland 3,363 tonnes, Zimbabwe 9,100 tonnes and Namibia 13,000 tonnes).⁴³⁴ This commitment remains unaffected even in situations where the EC may have to take safeguard measures in the beef and veal sector.⁴³⁵

The implications of this commitment are obvious. The EC normally applies a mix of specific and ad valorem tariffs on the importation of meat of bovine animals, and the commitment mentioned above applies only to the non-ad valorem part of the duties. To take the same example used above, i.e. CN Code 0201 10 00 10 (high quality beef and veal), this product, when it comes to the EU from Pakistan, a non-ACP country, would be subject to 12.8% ad valorem plus €176.8/100 kg; the duty applying on the importation of the same product from Mauritius, an ACP country, would be 0% ad valorem plus €176.8/100 kg; the duty applying on the importation of the same product from Kenya, an ACP country benefiting from the beef/veal protocol for a specified amount of imports, would be 0% ad valorem plus €14.1/100 kg - i.e. €176.8 reduced by 92%.

⁴²⁸ Note that the phrase 'import duties other than customs duties' under EC law at the time was almost equivalent to non-ad valorem duties. See for example definition of import duties under Article 4:10 of Council Regulation (EEC) No 2913/92, as amended, *OJ L* 302, 19.10.1992, p. 1.

⁴²⁹ Lomé IV is also credited for removing the old requirement that ACP exporters "levy an export tax" in exchange for the 90% reduction in non-ad valorem duties accorded by the Community. For more on this, see *The Courier*, March-April 1990, no. 120, p. 15.

⁴³⁰ See Article 1 of Protocol 4 to Annex V to the Cotonou Agreement.

⁴³¹ *Id.*

⁴³² See Article 2 of Protocol 4 to the Cotonou Agreement.

⁴³³ *OJ L* 348/5, 21.12.2002 pp. 5-41, *supra* n. 423.

⁴³⁴ See Council Regulation (EC) No 2286/2002, *OJ L* 348, 21.12.2002, Annex II, p. 41 together with Annex I, pp. 9-13. Note also that according to Article 2:5 of Regulation 2286/2002, "if an ACP State is not able to supply its annual allocation ... as a result of an actual or foreseeable decline of its exports due to a disaster such as drought, or cyclone or due to animal diseases and it does not wish to benefit from the possibility of delivery in the current or following calendar year, it may request, by 1 September of each calendar year at the latest, to reallocate the relevant quantities among the other States concerned, up to the limit of 52 100 tonnes, expressed in boneless meat." Whether Kenya has ever attempted to make use of this option is not clear. The only legal hurdle here might be whether Kenya's inability to supply beef to the European market following the collapse of the Kenya Meat Board would qualify as a "disaster" as this term is used here.

⁴³⁵ See Article 6 of Protocol 4 to the Cotonou Agreement.

4.3.3 LDCs under the EU GSP Scheme: the Everything but Arms (EBA) Initiative

The 'everything but arms' initiative refers to the unilateral measure introduced by the EU to allow duty- and quota-free importation of almost all products, except arms, from least developed countries (LDCs). First introduced in 2001 by EC Council Regulation No 416/2001,⁴³⁶ this law has later been incorporated into Council Regulation (EC) No 980/2005 applying a scheme of generalised tariff preferences.⁴³⁷ As such, this is an instrument which applies equally to all LDCs both within and without the ACP group.⁴³⁸

According to Article 12:1 of this regulation, "Common Customs Tariff duties on all products of Chapters 1 to 97 of the Harmonized System except those of Chapter 93 thereof [arms and ammunition and parts and accessories thereof], originating in a country that according to Annex I benefits from the special arrangement for least developed countries, shall be entirely suspended." Paragraphs 2, 3 and 4 of the same Article then provide for temporary exceptions for rice, bananas and sugar, respectively. Of these three specific products, while the exception for bananas has been phased out since 1st January 2006, sugar is expected to become part of the rule as from 1st July 2009, and rice from 1st September 2009. Pending the final phase out of the duties on these products, LDCs benefit from tariff quotas of a fixed, but annually rising, quantities at zero duty rates.⁴³⁹ No such exceptions exist for livestock products. It is thus possible to conclude that, in general, the difference between the EBA initiative and the Cotonou Agreement in terms of immediate trade benefits for IGAD member states lies mainly in the treatment of agricultural products. While both arrangements allow duty- and quota-free importation for manufacturing products from their respective beneficiaries, only the EBA law guarantees such treatment for all agricultural products. Given that all but one of the IGAD member states are LDCs, this in principle means that six of the seven countries are entitled to duty-free treatment for their livestock exports to the EU market, while Kenya would be subject to the slightly less generous arrangement for such products under the general rules of the Cotonou Agreement, tempered down for Kenya by its designation as a beneficiary of the special protocol for beef/veal. To illustrate this with the help of the same products used above, the duty applying to CN Code 0201 10 00 10 (high quality beef and veal) imported from Sudan, an ACP LDC, or Bangladesh, a non-ACP LDC, would in both cases be 0% ad valorem and complete exemption from specific duties.⁴⁴⁰ But, this would not be the same for Kenya, an ACP non-LDC developing country that would have to pay €14.1/100 kg for the same products under the beef/veal protocol, again within its quota.

4.4 EU Sanitary Regulations: How Far can IGAD member states Exploit the Preferences?

4.4.1 Introduction

The previous section has shown that the EU has put in place at least two types of preferential schemes for the benefit of IGAD member states in their status as LDCs and/or as parties to the Lomé-Cotonou agreements. We also saw that the schemes, and particularly the EBA initiative, could provide IGAD livestock exporters a significant competitive margin on the lucrative European market. We shall see, however, that these special commercial and regulatory attractions of the EU market have not

⁴³⁶ See *OJ L* 60/43, 28.2.2001.

⁴³⁷ *OJ L* 169/1, 30.6.2005, hereafter the GSP Regulation or the EBA initiative depending on the context.

⁴³⁸ Forty-one of the 50 countries in the current UN list of LDCs are ACP countries. See www.un.org/special-rep/ohrlls/ldc/list.htm.

⁴³⁹ See Article 12:5 of the EU GSP law, *supra* n. 437.

⁴⁴⁰ This is a result of Council Regulation (EC) No. 416/2001 (28 Feb. 2001) *OJ L* 60/43, 1.3.2001.

translated into actual export opportunities for IGAD member states largely due to the high, complex and ever-rising sanitary and other standards applying particularly to agricultural products coming to the EU. There is no sanitary equivalent to the preferential market access schemes described above, and all rules related to health and safety-related regulations fully apply to IGAD livestock exports. That is why Article 2 of Annex V to the Cotonou Agreement, which explicitly prohibits the imposition of quantitative restrictions or measures having equivalent effect on goods coming from the ACP countries, also contains a reservation clause that this prohibition does not exclude measures designed to, *inter alia*, protect human, animal and plant life or health.⁴⁴¹ The same applies to all goods coming from LDCs, i.e. the duty- and quota-free scheme of preferences put in place for the exclusive benefit of LDCs applies subject to full compliance with EU regulatory standards. Indeed, the preferential scheme becomes relevant only if such goods are able to meet the complex sanitary and other requirements set by European law. This section provides a synopsis of EU sanitary legislation that IGAD livestock exporters will need to comply with if they wish to access the European market regardless of the preferential scheme they might be eligible for.

4.4.2 The Structure of EU Sanitary Regulations

4.4.2.1 General

Every country sets its own health and environmental standards at a level it considers appropriate for its needs and introduces rules and regulations to enforce them. The principal purpose in all cases is identical - to ensure that food is safe for consumers, and to prevent the spread of pests or diseases among animals and plants.⁴⁴² We have seen in Chapter 2 that international law does not place any restrictions on the level at which countries can set their standards, and the principal interest of international law in general, and WTO law in particular, has always been limited to a desire to ensure that such standards are not used as disguised forms of restriction on international trade or as instruments of arbitrary discrimination between different trading partners.⁴⁴³

⁴⁴¹ Article 2 of Annex V provides: “1. The Community shall not apply to imports of products originating in the ACP States any quantitative restrictions or measures having equivalent effect. 2. Paragraph 1 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals and plants, the protection of national treasures possessing artistic, historic or archaeological value, conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption, or the protection of industrial and commercial property. ... 3. In cases where implementation of the measures referred to in subparagraph 2 affects the interests of one or more ACP States, consultation shall be held at the request of the latter, in accordance with the provisions of Article 12 of this Agreement with a view to reaching a satisfactory solution.” This last paragraph confers a right to consultation on the ACP countries affected by any such measures. However, given the ubiquitous nature of standards-based restrictions on the importation of particularly agricultural products such as livestock products, it is possible to dismiss this provision as nothing more than a good will gesture without any legal obligation.

⁴⁴² See WTO Secretariat, “Sanitary and Phytosanitary Measures” (The WTO Agreements Series, Geneva 1998), p. 5.

⁴⁴³ We know at the same time that such regulations can easily serve protectionist ends, as was demonstrated in the EU law that banned beef from animals treated with growth promoting hormones. The prohibition applied to both domestic as well as imported beef. Its effect was however particularly severe on foreign beef producers, and particularly those located in countries where use of those hormones was permitted. For example, Alan Sykes found that “the initial impact of the hormone beef regulation was to reduce US exports from about \$100 million annually to zero”. See Sykes, *supra* n. 60, p. 359. It is notable that such a protectionist effect occurred despite the fact that the measure was triggered by “an episode that raised bona fide concerns about the safety of growth hormones”. Sykes, *Id.*

The EU has set up a complex system of SPS rules and regulations intended to assure one of the highest levels of protection of human and animal life or health in the world today, including an explicit adoption of the precautionary principle.⁴⁴⁴ Indeed, the standards relevant to the livestock sector are such that they are currently the main barriers against the entry into Europe of IGAD livestock products. In the words of the EU Commission itself, "the role of customs is shifting away from the collection of customs duties, which have declined dramatically over the past 20 years, towards the application of non-tariff measures, including, in particular, those related to security and safety ... and the application of sanitary, health, environmental and consumer protection measures..."⁴⁴⁵ The US Department of Agriculture goes even further and accuses the EU of imposing sanitary barriers "unrelated to the spread of disease among animals."⁴⁴⁶ This section describes how the EU sanitary system operates to protect the market against entry of livestock products from IGAD member states by providing a summary of EU sanitary measures in the beef sub-sector.⁴⁴⁷

4.4.2.2 EU Food Safety Law

The EC has long recognized that the development of a truly integrated common market would not be possible until national veterinary and other sanitary regulations were harmonized throughout the Community. Already in 1964, an EEC Directive set out to eliminate sanitary obstacles to intra-Community trade through the progressive harmonization of health requirements for meat in slaughterhouses and cutting rooms and during storage and transportation.⁴⁴⁸ To enforce this scheme, the Directive came up with the idea of a health certificate issued by an official veterinarian of the exporting country to accompany a consignment of meat to the place of destination which was then recognized by importing country authorities as proof of compliance with the Community's sanitary standards. This Directive obliged member states to ensure that fresh meat sent from their territories satisfied several requirements, including that (1) it has been obtained from an approved and supervised slaughterhouse; (2) it comes from a slaughter animal inspected ante mortem by an official veterinarian; (3) it has been treated under satisfactory hygienic conditions; (4) it has been inspected post mortem by an official veterinarian; and (5) it is stamped and accompanied by a health certificate during transportation to the country of destination.⁴⁴⁹ Annex I to this Directive then provided detailed criteria that must be met before a slaughterhouse or cutting plant gets approval from the competent authorities, the hygiene of their staff, premises and equipment, criteria on ante mortem and post mortem inspection, stamping, certification, storage and transport.

The harmonization process initiated by the 1964 fresh meat Directive has been pursued consistently and vigorously over the past four decades in the form of several regulations and directives. For example, a 1989 EEC Council Directive on veterinary checks in intra-Community trade pushed the integration process further so as "to

⁴⁴⁴ See Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, *OJ L* 31, 1.2.2002.

⁴⁴⁵ See EU Commission, *Implementing the Community Lisbon programme - Proposal for a Regulation of the European Parliament and of the Council laying down the Community Customs Code (Modernized Customs Code)* {SEC(2005)1543}, COM/2005/0608 final - COD 2005/0246, p. 3.

⁴⁴⁶ See Dyck and Nelson, *supra* n. 119, p. 12.

⁴⁴⁷ That preferences do not apply to sanitary standards naturally means that the relevant EU rules in principle apply to all goods regardless of country of origin. There are however rooms for differentiation through bilateral agreements on mutual recognition of standards and the like.

⁴⁴⁸ See Council Directive 64/433/EEC of 26 June 1964 on health problems affecting intra-Community trade in fresh meat, *OJ L* 21, 29.7.1964, p. 2012–2032, repealed and replaced by Directive 2004/41/EC effective January 2006.

⁴⁴⁹ See Council Directive 64/433/EEC, Article 3.

ensure that veterinary checks are carried out at the place of dispatch only.”⁴⁵⁰ More recent laws have come up with an integrated approach in which one regulation lays down the general principles and requirements of food law and establishes the European Food Safety Authority⁴⁵¹; a second one lays down the rules on food hygiene in general⁴⁵²; a third sets the rules on production, processing, distribution and introduction of food products of animal origin;⁴⁵³ and two others lay down specific rules for the organisation of official controls⁴⁵⁴ and hygiene rules⁴⁵⁵ on food products of animal origin. These regulations together constitute the core of EU law on food safety and, in principle, they apply to all food products and food business operators, including those importing from or exporting to third countries.⁴⁵⁶ But, of course, the manner of enforcement differs depending whether the food is imported or produced within the Union.

Regulation 854/2004 provides the core of EU import law for foods of animal origin – that “products of animal origin shall be imported only from a third country or a part of third country that appears on a list drawn up and updated in accordance with the procedure referred to in Article 19(2).”⁴⁵⁷ Among the matters considered for qualification to be included in the list are: (1) state of national legislation on products of animal origin, animal feed and use of veterinary products; (2) state of health of the cattle, the organisation, powers, independence and effectiveness of veterinary authorities; (3) the disease status of countries or parts thereof; (4) the hygiene conditions of production, storage and transportation of meat in the case of fresh meat imports; and (5) verification by EU inspectors that the third country adheres to the requirements set by relevant European regulations.⁴⁵⁸ Inclusion in this list is an

⁴⁵⁰ See Recital and Article 4 of Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market.

⁴⁵¹ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, *OJ L* 31, 1.2.2002.

⁴⁵² See Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin, *OJ L* 226, 25.6.2004.

⁴⁵³ See Council Directive 2002/99/EC of 16 December 2002 laying down the animal health rules governing the production, processing, distribution and introduction of products of animal origin for human consumption, *OJ L* 18, 23.1.2003.

⁴⁵⁴ Regulation (EC) No 854/2004 of the European Parliament, and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption, *OJ L* 226, 25.6.2004.

⁴⁵⁵ See Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs, *OJ L* 226, 25.6.2004.

⁴⁵⁶ See for example Article 10 of Regulation (EC) No 852/2004, and Chapter III of Regulation (EC) No 854/2004. Note however that there are some differences in the treatment of food exports from the EU and food imports into the EU. Exports from the EU enjoy some flexibility in the sense that food that does not fully comply with Community food law could be placed on the market of another country provided, inter alia, that it complies with importing country food laws or the importing country expressly agrees. This does not allow exportation of food that is injurious to health. See recital and Article 12 of Regulation (EC) No 178/2002. Imports into the EU on the other hand are subject to a more rigorous regime and, in principle, such food must be in full Compliance with EU law. Failing that, the importer will need to satisfy EU authorities that it meets conditions recognised by the Community as “at least equivalent” to EU law. See Article 11 of Regulation (EC) No 178/2002.

⁴⁵⁷ See Article 11(1) of Regulation (EC) No 854/2004.

⁴⁵⁸ Adapted from the recitals of Council Directive of 12 December 1972 on health and veterinary inspection problems upon importation of bovine, ovine and caprine animals and swine, fresh meat or meat products from third countries (72/462/EEC).

arduous task which only a few countries have so far managed to achieve.⁴⁵⁹ The lengthy process has been usefully summarised by DG-SANCO in a document that provides a step-by-step guide to what countries need to do in order to be listed as qualified sources of origin for live animal and animal product imports into the EU and the following is adapted from this document.⁴⁶⁰

The country approval process involves a sequence of steps that starts with the national authority submitting a formal request for approval to the Commission services. The request normally includes “at least” the following information: (1) type of animal/product for which approval is sought; (2) anticipated volume of trade and main importing EU countries; (3) class of animals (breeding, fattening, slaughter, etc.) involved; (4) description of minimum treatment (heat, maturation, acidification, etc.) applied to the products; and (5) number and type of establishments considered to meet EU requirements (including confirmation that all proposed establishments satisfy EU requirements with specific references to the appropriate EU legislation). This is then followed by exchange of relevant documents and bilateral consultations that, if successful, should lead to an on-the-spot inspection by the EU Food and Veterinary Office (FVO). If a favourable report comes out of the FVO inspection and any other outstanding issues are resolved, the Commission then prepares draft legislation (1) to add the country to the list of third countries from which imports of the animal/product are approved; (2) to draw up if necessary animal health certification based on the country or part of the country’s health situation to accompany imports (a number of model health certificates are already laid down in Community legislation); (3) to approve the residues monitoring programme, i.e. a system to control the use of a range of veterinary drugs and other substances in animals and products intended for human consumption that often sets maximum residue levels; and (4) to set up an initial list of approved establishments.

The list that is drawn up on the basis of this regulation is constantly updated. None of the IGAD member states, and indeed no sub-Saharan African country except the beef protocol countries of Botswana, Namibia, Swaziland and Zimbabwe is included in the list of authorised Third Country Establishments.⁴⁶¹ No sub-Saharan country is authorised to export milk or milk products to the EU. The case of fresh poultry meat is even more discouraging for IGAD member states; the EU allows imports of this product only from the following nine countries: Argentina, Brazil, Canada, Chile, China, Croatia, Israel, Switzerland and Thailand.⁴⁶²

4.5 Conclusion

We can see from the foregoing discussion of the EU preferential trade regime for IGAD member states, and its development-blind food safety laws, that:

despite the MFN principle of the WTO system, the EU maintains a hierarchy of privileges for the benefit of developing countries, and IGAD member states are among the most preferred in this hierarchy;

⁴⁵⁹ Note that this has been EC practice for a long time. See *Id.*, and Council Decision of 21 December 1976 drawing up a list of third countries from which the Member States authorize imports of bovine animals, swine and fresh meat (79/542/EEC).

⁴⁶⁰ See EC Commission, Health and Consumer Protection Directorate-General, *General guidance on EU import and transit rules for live animals and animal products from third countries*, available at: http://ec.europa.eu/food/international/trade/guide_thirdcountries2006_en.pdf.

⁴⁶¹ A list of currently approved establishments is available at: http://ec.europa.eu/food/international/trade/third_en.htm. Kenya and Uganda appear in the list for as authorised fish exporters to the EU. Note also that the reference here to Sub-Saharan Africa excludes South Africa, which is authorised to export livestock products to the EU.

⁴⁶² See list at <http://forum.europa.eu.int/irc/sanco/vets/info/data/listes/pm.html>.

however, to the extent that EU food safety laws are designed and applied without due regard for the particular concerns and challenges of developing countries, this privilege remains only academic at least in the agricultural sector;

the EU's reservation of generous country-specific tariff quotas under the WTO for the likes of Brazil, Australia and the US only brings into question the EU's commitment to support the development of poor countries such as the members of IGAD; and

the EU's provision of generous refunds on the export of surplus livestock products to IGAD member states elevates the question to one of whether the EU is at all genuine in its high-profile commitment to support the trade performance of these countries.

Given the central role of the livestock industry for poverty alleviation in the IGAD region, it is high time that IGAD member states pull their efforts together and put pressure on the EU to translate its official commitments into concrete opportunities, not least by introducing some degree of consistency and complementarities between its trade and development policies.

However, unlike the case of tariffs and other barriers, the EU cannot grant 'preferential' standards for the benefit of the IGAD livestock industry. No matter how supportive the EU may want to be, its primary responsibility in this area is to protect its citizens and the environment against food-borne diseases and pests. Furthermore, even if the EU were to come up with differential and preferential sanitary standards for IGAD livestock products, that would automatically send the wrong signal to the European consumer - that IGAD livestock products are of a lesser quality or standard of safety. This is hardly what IGAD livestock producers would like to be associated with. Consequently, the only way the EU or any other country could support the IGAD livestock industry and the large number of poor people working in it is by helping governments and producers to enhance their production standards rather than by lowering import requirements on differential basis. A targeted assistance to the sector would be able to address some of the major disease and sanitary challenges faced by the livestock industry in the region. Given that many, if not most, of the challenges are common to many IGAD member states, an IGAD-wide rather than a member-state level approach may produce larger benefits relative to the amount of investment.

5.1 General

The IGAD region has one of the largest concentrations of livestock in the world. However, this resource wealth has not been translated into export revenues for the countries and the people who depend for their livelihoods on the sector. Although several factors may be responsible for this mismatch between actual resources and export revenues from those resources, this study has attempted to describe the problem and analyse it from one particular angle - the extent to which the regulatory framework governing livestock production and trade at all levels, i.e. national, regional as well as international, has contributed to this gap.

An important objective of this study is to see whether the regulatory framework “encourages or discourages trade within IGAD as well as with third countries”. This calls for an investigation into the relationship between law and business transactions in general and import-export trade in particular. This relationship can be seen from different levels of generality - the relationship between the overall legal culture and tradition of a country and its implications for business in that country or the extent to which the general business and trade rules and regulations of a country are conducive for import-export business. This study has focused on the latter as related to the livestock industry. However, such specific trade rules and regulations cannot exist in a vacuum and their overall effectiveness entirely depends on the legal culture and traditions of the particular legal system in question. The role of such broad subjects as rule of law, the accessibility of laws, the transparency and predictability of their administration, and the efficiency and competence of the courts to administer justice will always have a bearing on the role of the regulatory framework in facilitating or hindering the growth of commerce. It is by now a well-established fact that the development of a sustainable business sector requires first and foremost a regulatory framework in which governments act “not only by law but also under the law”.⁴⁶³

Many people working directly in the IGAD livestock industry have serious reservations about the extent to which the concept of rule of law is recognized let alone implemented in the administration of livestock production and trade policies in these countries. Indeed, it is sometimes worrying to learn that, in some of the IGAD member states, even the legal departments of the relevant government ministries may not necessarily have a list of laws relevant to their day-to-day operation.⁴⁶⁴ The capacity of the courts in virtually all of these countries is such that many businesspeople appear to prefer to give away their legitimate rights, or try to follow illegal routes to protect their rights, rather than take their cases to courts of law. Needless to say, there can be no rule of law in the absence of a strong, independent and efficient judicial system in a country. And on this, each of the IGAD member states has a great distance to travel.

The livestock sector is subject to an intricate web of regulations and standards emanating from a multiplicity of sources. The two scientific institutions, the OIE and Codex, serve vital purposes in international economic relations - setting largely science-based standards on animal health and food safety as well as creating a

⁴⁶³ See E-U Petersmann, “How to Promote the International Rule of Law: Contributions by the World Trade Organization Appellate Review System” 1 *Journal of International Economic Law* (1998), pp. 25-48, at 26. As Carothers put it, “[b]asic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government’s many involvements in the economy—regulatory mechanisms, tax systems, customs structures, monetary policy, and the like— would be unfair, inefficient, and opaque.” Thomas Carothers, “The Rule of Law Revival”, 77(2) *Foreign Affairs* (March/April 1998) p. 97.

⁴⁶⁴ In one case, the only law I could find in the legal department of a ministry was the national constitution.

benchmark on the basis of which national standards could be developed and evaluated. While the importance of these twin services is beyond doubt, it is hardly surprising that many developing countries are struggling to cope with this system while their trade interests continue to suffer. The influence of the poorest countries on international standard-setting institutions has remained weak, and this is even more so of IGAD member states. The cumulative result is that many countries see the two standards institutions as the institutional embodiment of the use of science to exclude their products from rich country markets.

The study has demonstrated this by analysing the effect of EU sanitary measures on IGAD livestock trade. However well-intentioned the EBA initiative or the Lomé-Cotonou beef/veal protocol might have been, the EU market is effectively closed for IGAD livestock products, and will remain so for the foreseeable future. Indeed, under such circumstances, all the rhetoric about using trade liberalization and the WTO system as a tool of poverty alleviation by creating agricultural market access opportunities for developing countries will remain an illusion. What is more, there is no reason to foresee any drastic change in the global approach to the relationship between trade liberalization and the protection of human, animal and plant health and safety. The choice of the EU, perhaps the most sophisticated system of economic regulation, to make this case is not intended to suggest that IGAD member states must immediately launch a programme to meet those sophisticated and costly requirements. This can only be a very long term goal at best. But, the prospect for livestock products in fast-growing markets in Asia and elsewhere is so promising that some are already writing about a new "livestock revolution". The reputation of IGAD livestock products in their traditional Middle Eastern markets is still strong despite the frequent import bans that have been imposed on grounds of animal disease outbreaks. The sanitary and other standards in many of these emerging and established markets is almost certainly lower than the EU's, and IGAD member states will be better off investing in their livestock sectors in the form of disease surveillance and control measures and monitoring and certification schemes, with a view to meeting the standards of these markets. As part of this strategy, IGAD member states should consider negotiating market access concessions with such emerging markets rather than focus on the developed country markets. Indeed, using development assistance from established development partners such as the EU to build livestock production and export capacity that would meet the requirements of the emerging markets might be a strategy worth considering.

The challenge facing IGAD's livestock industry is not just the unfavourable global regulatory framework whose terms are dictated by the rich countries; IGAD member states themselves have also contributed to their declining influence in the making of this global framework. The reasons are understandable, but so also are the solutions. It is clear beyond doubt that the financial, human and technical constraints faced by these countries can be too much for a single IGAD member state to resolve on its own. The amount of public sector investment required to establish a competent and state-of-the-art system of veterinary laboratories and monitoring and certification mechanisms so as to meet importing country standards is often beyond the reach of most if not all the countries in the region.⁴⁶⁵ That is where a regional organization such as IGAD could be used to pool resources together and deploy them for the common goal, and this can be done at both the technical-scientific level as well as the level of diplomatic representation in the relevant global fora. The single most important first step should therefore be for IGAD member states to acknowledge that each individual IGAD member state is too small to matter while IGAD as a grouping could be powerful enough to push its agenda on the international stage. As suggested in Chapter 2 above, an IGAD-level collaboration in this field would enable them to: (1) identify sectors of common interest; (2) identify common challenges; (3) create a mechanism by which they can develop common positions; and (4) speak in one voice

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See Josling et al, *supra* n. 103, p. 51.

at these organizations, ideally through a single representative with an IGAD-wide mandate. This might mean devising means by which a single institution could be accredited to represent all countries of the region, not an easy recommendation to implement. The immediate action point may thus be to study how countries could identify an area of common interest, such as livestock trade, and pool their resources to come up with a single autonomous institution that can effectively represent the interests of the sector in all countries of the region. This will also have implications for the way in which capacity building work is carried out in the region.

5.2 Conclusions

Law is only a tool for the implementation of policies. The content of laws is determined by the policy objectives and implementation strategies, rather than vice versa. There are a number of well-intentioned and well-thought policy ideas readily available to IGAD and its member states. Indeed, in many cases, we know what needs to be done and the problem often relates to the question of how to actually do it. It is here that an understanding of law and legal institutions as means of policy implementation becomes vital. We have seen that the regulatory framework within which trade in IGAD livestock products takes place has got problems at every level - international, regional, national as well as local. At the international level, the regulatory framework is designed and operated with little participation or influence from IGAD member states; animal diseases of particular economic significance to the region, such as rift valley fever, are a low priority in the international standard-setting institutions. The COMESA level trade liberalization initiatives have yet to make any practical difference to trade in the sector. Different regional integration initiatives are competing for the already meagre human and financial resources in these countries. At the IGAD level, there is every intention to do the right thing but almost nothing in terms of concrete measures to identify and tackle common problems, harmonize policies, or facilitate intra-IGAD trade in livestock products. This needs only one thing - the political will to translate aspirations and declarations of intention into concrete and enforceable legal commitments. The few bilateral trade liberalization agreements between countries within IGAD are often unenforceable (e.g. the cross-border trade facilitation protocols), and sometimes outright meaningless (e.g. those bilateral agreements that impose MFN obligations on the parties). National veterinary and other regulatory systems suffer from capacity constraints in terms of financial resources, skilled manpower and scientific and laboratory facilities; laws are often inaccessible, unclear, outdated or simply discouraging to investment and exports; administrative systems lack experience in the use of rules of law as tools for the implementation of policy decisions.

5.3 Recommendations

Most of these problems do not have easy solutions and the following recommendations are intended only as possible first steps towards addressing this complex set of challenges. IGAD member states can do a great deal at IGAD level as well as unilaterally and bilaterally.

- Externally, there is no doubt that the IGAD livestock industry is faced with an unfriendly international regulatory environment in the design of which its member states have virtually no say. But, their interests also suffer from possibly illegal measures taken by governments of actual or potential export markets for IGAD livestock products. IGAD member states could consider several options, including:
 - (1) Accession to relevant international organizations: those IGAD member states that are not members of these organizations should actively seek accession and IGAD member states already within those organizations could use their powers to support the accession of their fellow IGAD member states, and

- (2) Collective representation in relevant international organizations: while this might look rather unrealistic in the current political environment within IGAD, their collective interest would be best served if they speak with one voice at these organizations, ideally through a single representative with an IGAD-wide mandate.
- At the national level, the single most important first step is to conduct a law review and possibly law reform process with a view to developing a coherent, up-to-date, complete, accessible and enforceable set of sanitary and food safety regulations for the livestock industry. Kenya, the country with relatively the most advanced legal system in the region, is already doing that while the countries that need it most are not.
 - Likewise, the law review and reform process suggested above can also be used to address the problems of multiple and excessive taxation of the livestock sector and any other laws and practices that discourage business and investment in the sector. While taxing exports is an easy and tempting way of collecting government revenue, we need to realize that export taxes are a thing of the past and the real competition among livestock exporting countries has largely been on the amount of overt and covert subsidies they can provide to their livestock exporters. IGAD members may not need, nor afford, to provide export subsidies, but they can at least abstain from actively discouraging businesspeople who may want to operate in the field.
 - At a more general level, IGAD member states must look at rule of law as part and parcel of the effort to encourage economic activity and achieve economic development and poverty reduction. This requires, among other things, cultivating an administrative culture in which every decision is based on clearly articulated legal authority, and ultimately subject to review by an independent and competent administrative or judicial organ. These are complex developmental issues that can only evolve over an extended period of time, but we must start somewhere. Two actions that can be taken immediately in this respect are:
 - (1) compilation of all relevant laws and making them available to stakeholders within these countries (preferably in hard copy) as well as publishing them on a dedicated web site to make them available more widely, and
 - (2) provision of basic legal training to relevant government officials and private sector people working in the livestock sector.

APPENDIX I: IGAD MEMBER STATE DELEGATES TO CODEX COMMISSION ANNUAL MEETINGS

Country	Delegates	Affiliations	Codex Commission Session				
			29 th Session (July 2006)	28 th Session (July 2005)	27 th Session (28 June–3 July 2004)	26 th session (30 June–7 July 2003)	24 th Session (July 2001)
Eritrea	Tekleab MESGHENA	Director- General, Codex Contact Point, Ministry of Agriculture	X	X			
	Yohannes TENSUE	First Secretary, Alternate Permanent Representative to FAO, Embassy of Eritrea		X		X	
Ethiopia	Mesai GIRMA	Director- General, Quality and Standards Authority of Ethiopia		X			
	Fortuna DEBACO	Senior 2nd Secretary, Embassy of the Federal Democratic Republic of Ethiopia				X	
Kenya	Daniel MUNGAI	Senior Fisheries Officer, Ministry of Livestock and Fisheries Development	X				
	Maurice OTIENO	Senior Fisheries Officer, Ministry of Livestock and Fisheries Development	X				
	Japhet M'ANAMPIU	Fisheries Officer, Ministry of Livestock and Fisheries Development	X				
	Evah ODUOR	General Manager, Standards Development Division, Kenya Bureau of Standards	X	X	X		
	Alice ONYANGO	Senior Standards Officer/Codex Office, Kenya Bureau of Standards	X				
	Hannah ODIPO	Senior Industrial Development Officer, Department of Industry, Ministry of Trade and Industry					
	Ntayiai RHONEST	Chief Chemist, Kenya Plant Health Inspectorate Service	X				
	Tom OLIELO	Head of the Agrochemical Department, Secretary of National Codex Committee,		X	X	X	

		Kenya Bureau of Standards					
	Gladys MAINA	General Manager - Quality Assurance, Kenya Plant Health Inspectorate Service		X		X	
	Joseph MUSAA	Assistant Director, Department of Veterinary Services		X			
	Joseph MBURU	Attaché (Agricultural Affairs), Alternate Permanent Representative to FAO, Embassy of the Republic of Kenya		X			
	Chagama KEDERA	Managing Director, Kenya Plant Health Inspectorate Service			X		
	Christian LANGAT	Trade Mark Examiner, Kenya Industrial Property Institute			X		
	J.W. JALANG'O	Assistant Director of Veterinary Services, Ministry of Livestock Development, Veterinary Research Laboratories, Veterinary Public Health Division				X	
	Samuel YEGON	Agricultural Attaché, Alternate Permanent Representative to FAO, Embassy of the Republic of Kenya				X	
	E.L. Songole	General Manager, Standards Development, Kenya Bureau of Standards					X
	J.P. Nthuli	Deputy Director of Veterinary Services, Veterinary Research Laboratories					X
Sudan	Abbas EL FADIL	Director of the Regional Training Centre for Meat, Inspection Hygiene and Grading, Federal Ministry of Animal Resources and Fisheries		X			
	Abbasher KHALID	Director, Quarantines Department, Ministry of			X		

		Animal Resources					
	Abdlatief MOHAMED AHMED	Food Safety, Head Department, National Chemical Laboratories, Federal Ministry of Health		X			
	Abdelgadir ABDELGADIR	Director General, SSMO				X	
	Ahmed YOUSIF	Director General, General Administration for Planning Federal Ministry of Animal Wealth and Fisheries				X	
	Cinzia MINGIARDI	Assistant to Permanent Representative, Embassy of Sudan				X	
	Hamdi IBRAHIM	Director, Standards and Quality Control Unit, Federal Ministry of Agriculture and Forestry	X	X	X	X	
	Husina Mohammed	Ministry of Animal Resources					X
	Ismail ALKAMISH	Director, Food Control Administration, Federal Ministry of Health	X				
	Kamal MOHAMED ECHADI	Executive Manager, Sudanese Standard	X				
	Mohamed EL HASSAN	Under Secretary, Federal Ministry of Agriculture and Forestry		X	X	X	
	Mohamed HARBI	Director-General, Sudanese Standards and Metrology Organization	X	X		X	X
	Omer ABDALLA	Under-Secretary, Federal Ministry of Agriculture and Forestry	X				
	Suad SATTI	National Chemical Laboratories and Food Safety Coordinator, Federal Ministry of Health			X	X	
	Yassin BABIKER	Director-General, Sudanese Standards and Metrology Organization		X	X		
	Yousif ABDALRAZIG	Head, Exports and Imports Unit, Quarantine Department, Federal Ministry of Animal Resources	X				
Uganda	E. Kasirye-Alemu	Executive Director, Uganda National Bureau of Standards					X

	Sam Balagadde	Standards Officer, Uganda National Bureau of Standards					X
	William SSALI	Chairman, National Standards Council, c/o Uganda National Bureau of Standards	X				
	Terry KAHUMA	Executive Director, Uganda National Bureau of Standards	X	X	X	X	
	Ben MANYINDO	Deputy Executive Director (Technical), Uganda National Bureau of Standards	X	X	X	X	
	Hope KABIRISI	Special Presidential Assistant (Science and Technology), State House	X				

APPENDIX II: ACCORD SUR LES TARIFS POUR LES PRESENTATION DE SERVICE DU CENTRE D'EXPLOITATION REGIONALE DU BETAIL (DAMMERJOG DISTRICT D'ARTA)

ACCORD SUR LES TARIFS POUR LES PRESTATIONS DE SERVICE DU CENTRE D'EXPLOITATION REGIONALE DU BETAIL (DAMMERJOG - DISTRICT D'ARTA).

Les deux parties ont convenu ce qui suit :

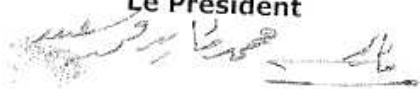
Pour 24h : 5 \$ par petit ruminant
10 \$ par grand ruminant

Après 24h : 1,60 \$ par grand ruminant et par jour
70 centimes par petit ruminant et par jour

En attendant d'officialiser la convention entre les commerçants du bétail nationaux et le promoteur du centre (Abu Yasser), ces tarifs du centre restent en vigueur et tout le bétail exporté à partir des ports de la République de Djibouti doit transiter par le centre régional de quarantaine de Damerjog. Celui-ci offre toutes les facilités pour les activités d'exportation, apporte une crédibilité supplémentaire et constitue un outil indispensable pour le développement du commerce du bétail.

Pour le CERB

Le Président



Mohamed Kaïd Mohamed

Pour les Commerçants
du Bétail

- Mohamed Ahmed
Omar

- Djama Ali Ahmed



05 NOV 2006

Appendix III: Conditions to Import Livestock into Saudi Arabia (sample document obtained from Sudan)

ACTIVIA 3000
Fax

ملاحظات Remarks	العدد Number	السلالة Breed	نوع الحيوان Species
	١٠٠٠	موزانية	أبقار

(١) يجب أن تكون الحيوانات مصحوبة بملفها الصحية من الجهة المستفيدة وشهادة منشأ، وموالية من السفارة السعودية في بلاد المنشأ وسارية المفعول.
(٢) يجب أن يكون في الشهادة الصحية النسبة المبردة وتاريخ التلقيح ضد الأمراض المعدية وجميع مشتاتة الزفرات من آثار ملات
(٣) يجب أن يكون لدى الشخص هذه الحيوانات خلال أربع وعشرين ساعة من موعد التمكن ووجدت سليمة وخالية من أمراض أي من الأمراض القوية
والسامة أو الطفيليات الخارجية
(٤) تصدع جميع الإرسابات الواردة للبلاد (الزورن) المعبر البيطري في دول جيش التعاون لدول الخليج العربية وإلحاحه لتطبيقه والقرارات الوزارية
والإفريقية ذات الصلة.

(٥) يجري مفعول هذا الإذن لمدة (٦٠) يوما من تاريخ إصداره ، وسليح الإرسابة واحدة فقط.
(٦) يجوز للوزارة إلغاء هذا الإذن في حالة حظر الإرسابة من الدولة المستفيدة قبل مغادرة الإرسابة لدولة المنشأ.

- 1) The animals should be accompanied by a valid Health Certificate issued by the relevant authority and Certificate of Origin, and attested by the Saudi Arabian Embassy in the country of origin.
- 2) The Health Certificate should include the health condition and the dates of vaccinations against specific diseases and all the conditions required by the Ministry.
- 3) The animals should be examined within 24 hours before loading and found healthy and free from any symptoms of infectious and epidemic diseases and external parasites.
- 4) All imported consignments should comply with the Veterinary Quarantine Law in the G.C.C States, its Executive Regulations and the relevant Ministerial and administrative directives.
- 5) This permit is valid for (60) days from the date of issue and good for one consignment only.
- 6) The Ministry may cancel this Permit in case of banning importation from country above, before departure of the consignment from country of origin.

مدير عام الشؤون الزراعية
G.D.O.F General Directorate For Agricultural Affairs - Jeddah Region
م/ جابر بن محمد الشويخي
Eng. JABER M. AL-SHAIKH

الختم
Stamp

مدير المعبر البيطري والتلقيح
Animal and Poultry Quarantine
Director in Makkah Region - Jeddah
م/ سعود م. آل رابحي
Eng. Saud M. Al-Rabighi

الرقم: ١٤٣٢٢/١١/٤ التاريخ: ١٤٣٨/١/١٢ القدرحات

Import conditions Of livestock from Djibouti

For reasons to protect the livestock in UAE and to save manhealth from common diseases, condition were setup to fulfill the requirement for imported animals from Djibouti ... as following:

1- import permit from the ministry of environment and waters .

2 official veterinary sanity certificate ;to prove that the animals are fit and have no signs of diseases the day of shippment ,attached with official laboratory certificate in period.

3 not less than 21 days from the day of shippment ,has negative results for the following diseases :

-Rift valley diseases

- Brucellosis

- Food and month diseases

-Rinder pest (cattle plague)

4 - All vaccines, dates of vaccinations and company must be mentioned.

5- Animals must be free from external parasites and sprayed or dipped during a period less than 15 days before shipment by internationally approved insecticide and mention name of insecticide , method of use .

6- The Animals must be shipment directly from Djibouti to U AE .

7- The ministry has the right to perform laboratory tests for the following.

- R.F.

- Brucellosis.

- F. M.D

8- In case of unfulfillment of the above mentioned conditions the shipment will be re-exported at the expenses of the importer.